Supreme Court, U.S.
FILED
952076 JUN 25 1996
OFFICE OF THE CLERK

NO. _____

In The

SUPREME COURT

Of The

UNITED STATES

October Term, 1996

Nelson Fernandes,

Petitioner,

- vs -

Rockaway Township Town Council,

Township Engineer,

R.V.R.S.A. & Executive Director,

E.P.A. & Regional Administrator of Region II,

Dorsey and Bell

John Dorsey and Joseph Bell

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Nelson Fernandes, Esq. (Pro-se)
9 Fox Run
Denville, New Jersey 07834
(201) 627 - 2138

98 pp

QUESTIONS PRESENTED

1. Were EPA's memos and the evidence presented to support summary judgment to enforce a Title VI regulation and equal protection sufficient to support a continuing violation of the regulation and meet EPA's motion for summary judgment.

2. Did the court abuse its discretion on each issue, so this Court can vacate its orders for a de novo review, as a matter of law, in order to decide petitioner's original motion for summary judgment on the violation of regulation and equal protection.

3. Can a federal agency impose a grant condition without stipulating the federal authority so recipients are aware of what Congress expects.

4. Did EPA violate this state's independence and due process by negotiating denials with NJDEP to affect the *judicial* aspect of their review, and by imposing a grant condition that requires *legislative* action to justify denying sewer service in support of a contractual condition.

5. Did Rockaway and RVRSA violate their duty by failing to enforce the Title VI regulation, determine the limits of EPA's authority, and not protecting its inhabitants interests so as to hold them liable for damages even if EPA immunity is not waived.

6. Would this Court like to address any other appropriate question warranted by the facts in this case.

TABLE OF CONTENTS

	PAGES
OPINION/JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
I STATUTE OF LIMITATIONS ERROR	4
II TITLE VI JURISDICTION ERROR	7
III WAIVER OF SOVEREIGN IMMUNITY	11
IV SUMMARY JUDGMENT	15
V UNLAWFUL GRANT CONDITIONS	22
VI ESSENTIAL FACTS NOT CONSIDERED	23
VII ROCKAWAY'S FRAUD ON THE COURT	25
CONCLUSION	28
APPENDIX	29
A- A.C. - Rehearing Petition Denied (5/13/96)	29
B- A.C. - Court Order Affirmed(3/26/96)	30
C- D.C. - Summary Judgment Order (8/24/95)	31
D- D.C. - Order on Reconsideration (6/19/95)	34
E- D.C. - Order Dismissing Case (5/11/95)	37
F- Receipt for payment of sewer assessment	39
G- Copy of Certified Ordinance	40
H- EPA Admission of facts not in dispute	41
I- Continuation of statutes and Regulations	43
J- Summary of Exhibits on Mr. Bell's Fraud	45
K- Robert Hargrove Memo	46
L- Daniel Sullivan Memo	52
M- Certification of Robert Hargrove	59

TABLE OF AUTHORITIES

CASES:

Abbott Labs. v. Gardner, 387 U.S. 136 (1966) 6, 9
Adams v. Trust., NJ BR. TR., 29 F.3d 863, 869 3, 4
Al. NAACP v. Wallace, 269 F.Supp. 346 (1967) 13
Alexander v. Choate, 469 U.S. 287 (1984) 17
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 16, 23
Antilles Ind.,Inc. v. Gov. Vir. Isl., 388 F.Supp. 315 16, 23
Berlanti, 780 F.2d at 301 27
Boonton Mayor v. Boont. Wat.Co., 69 N.J. Eq. 23 7
Burt v. Union Cent. L. Ins. Co., 187 U.S. 362 10
Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 8
Cape May Greene, Inc. v. Warren, 698 F.2d 179 (1983) 4, 12, 13, 14, 17, 18, 22, 24
Carmi v. Metro St. Lo. S.D., 620 F.2d 672 (1980) 10
Chapman v. Houst. Welf. Rights Org., 441 U.S. 600 9, 22
Chas. Steward v. Davis, 301 U.S. at 593 22
City Nat. Bank v. U.S., 907 F.2d 536 (1990) 4
Collins v. Bd of Adj. of Margate, 3 N.J. 200 (1949) 21
Crown Coat Front Co. v. U.S., 386 U.S. 503 (1966) 6
David v. Lane, 839 F.2d 1265 (1988) 19
Dent v. Cunningham, 786 F.2d 173, 175 5
Depew, 787 F.2d at 1499 27
Dermott S.S.D. v. Gardner, 278 F.Supp. 687 (1968) 13
Diehl v. U.S., 438 F.2d 705 (1971) 25
DOE v. USCSC, 483 F.Supp. 539 16, 24
Erie R. Co. v. Tomkins, 304 U.S. 64 (1937). 21
Federal Crop Ins. v. Merrill, 332 U.S. 380 (1947) 6, 16
Fla. Gen. Cont. v. Jacks., 124 L.Ed 2d 586. 4, 9, 20
Florida Rock Ind.. v. U.S., 791 F.2d 893 (1986) 18
Franklin v. Gwinnett Cnty. , 112 S.Ct. 1028 (1992) 2, 12
G.D. v. West. Sch. Dist., 930 F.2d 942 3

Guardians Ass'n. v. C.S.C.,NYC, 463 U.S. 582 (1982) 7, 8
Gardner v. St. of Al., D.P. S., 385 F.2d 804 (1967) 12
Gibney v. Toledo Bd. of Ed., 596 N.E.2d 591 5
Gillette Tire v. App. Ind.,Inc., 596 F.Supp. 1277 15
Gioia v. B.C. H. S., Inc. of Mo., 641 F.2d 540 (1981) 15
Goetz v. Crosson, 41 F.3d 800 5
Gomez v. Ill. St. Bd. of Ed., 811 F 2d. 1030 (1987) 8
Greene v. Costle, 577 F.Supp. 1225, (1983) 13
Hafer v. Melo, 112 S.Ct. 358 (1991) 12
Hahn v. U.S., 757 F.2d 581 (1985) 13
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1981) 5
Harris v. McRae, 100 S.Ct. 2671, 2691 (1980) 22
Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1943) 27
Howard Iron Wks v. Buff. Elev. Co., 81 N.Y.S. 452 12
Idaho Cons. Lea.. v. Russell, 946 F.2d 717 (1991) 11
Impro Products, Inc. v. Block, 722 F.2d 845 (1983) 6
Ind. Con. Corp. v. US Bur. of Rec., 15 F.3d 963 3
Isreal Aircraft Ind. v. St. Pr., 72 F.R.D. 456 (1976) 27
Jibson v. Mich. Ed. Assoc., 30 F.3d 723 3
Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) 17
Kasper v. Bd. of El., 814 F.2d 332, 339 (1987) 4, 11, 15, 16, 23, 25
Kelly v. Railroad Retire. Bd., 625 F.2d 486 16
Kentucky v. Graham, 473 U.S. 159 (1985) 12
K. & K. v. Champ. Pet. Co., 657 F.2d 1147 1981). 28
Lau v. Nichols, 414 U.S. 563 (1974) 8
Lockhart v. West. Credit Corp., 879 F.2d 43 (1989) 11, 26
Mallory v. Eyrich, 922 F.2d 1273 (1991) 15
Maywood Land Co. v. Roch. Park, 13 N.J.M. 842 7
Matthews v. Rail. Ret. Bd., 472 F.2d 1176 (1973) 7
M&M Bank v. D-G Corp., 801 F.2d 742 (1986) 5
Mikel v. Gourley, 951 F.2d 166 (.1991) 15

Monell v. N.Y.C.D. of Soc. Svc., 436 U.S. 658(1978) 12
NLRB v. Frazier, 966 F.2d 812 (3d.Cir 1992) 27
Nudd v. Burrows, 91 U.S. 426 (1875) 25
Page v. U.S., 729 F.2d 818, (1984). 5
Pennhurst St. Sch. v. Halderman, 451 U.S. 1 (1980) 9, 17
Pettinaro Const. v. Del.Auth., 500 F.Supp. 559 23
Public Citizen v. N.R.C., 901 F.2d 147 1990) 5
Purgess v. Sharrock, 33 F.3d 134 (1994) 26
Salvador v. Bennett, 800 F.2d 97 (1986) 13
Scott v. City of Hamm., Ind., 741 F.2d 992 (1984) 13
Service v. Dulles, 354 U.S. 363 (1957) 10
Shanty Town v. EPA, 843 F.2d 782 (1988) 17
Simpson v. Reynolds, 629 F.2d 1226 (1980) 10
Soberal- Perez v. Heckler, 717 F.2d 36 (1983) 8
Speakman v. May. & Cnl of N. P., 8 N.J. 250 (1951) 21
St. of N.J. v. E. Shores, Inc., 194 N.J.S. @ 537 7
Thompson v. Pa. Power Co., 402 F.2d 88, 91 24
U.S. v. City of Det., 720 F.2d at 451 (1983) 13
U.S. v. Kramer, 827 F.2d 1174, 1179 (1987) 8
U.S. v. McKeon, 738 F.2d 26 (1984) 26
U.S. v. Nixon, 418 U.S. 683 (1974) 8, 10 13, 17
U. S. v. Shimer, 367 U.S. 374, 381 9, 10
U.S.D.O.E. v. Ohio, 503 U.S. 607 (1992) 11
Unpublished Case, 220 Ct. Cl. 605 (4/6/79) 10, 15, 18, 19, 22
Valenti v. Mitchell, 962 F.2d 288 (1992) 4 ,8, 25
Vitarelli v. Seaton, 359 U.S. 535, 539 (1959) 10,13,16, 22
Wabash Ry. Co. v. Vanlandingham, 53 F.2d 51 12
West v. Phil. Elec. Co., 45 F.3d 744 (1995) 4, 11, 24

White v. Secretary of Army, 629 F.Supp.64 (1984) 6
Williams v. L.R. Wat. Works, 21 F.3d 218 (1994). 13
Wind River Min. Corp. v. U.S., 946 F.2d 710 (1991) 6
WOFAC Corp. v US, 269 F.Supp. 654 (1967) 5, 23

STATUTES:

APA 16, 22
N.J.'s Wetlands Act. 20
N.J.S.A. 40:48-2: 21
28 U.S.C. 2401(a) 6
CWA (Clean Water Act)
4, 11, 13, 14, 22, 23, 24
33 U.S.C. 1317 13
33 U.S.C. 1365(a)(2) 13
33 U.S.C. 1365(2) 12
33 U.S.C. 1365(e) (505(e)) 11, 12
Title VI
1, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 23
42 U.S.C. 2000d-2 12, 13

RULES AND REGULATIONS:

F.R.C.P. Rule 56(g) 23
F.R.C.P. Rule 79(b), 15
F.R.A.P. R.4.(a)(1) 15
40 CFR Ch. I, Subpart F, §30.600 (E) 1, 4, 7, 8, 16

ORDINANCES:

Rockaway's §54-100 L 2, 21

CONTRACT CONDITIONS:

Grant Condition 4(b) 2, 4, 16

OPINIONS BELOW

The opinion of the district court is contained in its orders of June 19, 1995 (App.D, p.34) & August 24, 1995 (App.C, p.31).

In both opinions, the court finds the grant condition protects wetlands by denying sewer service. These opinions override a Court of Claims holding that a grant condition by EPA that denies sewer service is a taking (p.18). In effect, the court sanctions EPA's equal protection and due process violation, since the Court of Claims decision precedes EPA's grant condition. The court's opinions also overrides Cape May Greene, a case that found the grant condition violated the CWA.

JURISDICTION

Petition for Rehearing denied (5/13/96). District Court Order Affirmed (3/26/96). District Court's Order on summary judgment (8/24/95). Order on Reconsideration (6/19/95). Order Dismissing Case (5/11/95). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (Review Circuit Ct. decision).

STATUTORY PROVISIONS INVOLVED

REGULATION IMPOSED ON RECIPIENTS

40 CFR Ch. I, Subpart F, §30.600 (E) "Civil rights act. you must comply with section 602, title VI of the civil rights act of 1964. (42 U.S.C. 2000d) and related nondiscrimination laws and executive order 11246. **These authorities prohibit you from excluding any person from participating in, denying them the benefits of, or** discriminating against them on the basis of race, color, or national origin under **any program or activity involving federal financial assistance.**" (emphasis added)

CONDITION THAT CONFLICTS WITH REGULATION

Assistance I.D. No. C340389-04 amendment no. 1 (4.b.)" **The grantee agrees that for a period of 50 years from November 29, 1983, no sewer hook-up or other connection to the sewage treatment facilities included in the scope of this grant will be allowed or permitted so as to allow the discharge of wastewater from any building, facility or other construction on any parcel of land, as delineated on the maps cited in (a) above, that is within any wetlands** or within the 100 year floodplain, which land parcel as of November 29, 1983 was undeveloped (i.e., upon which no building, facility or other construction has been erected or placed) unless approved in writing by the Regional Administrator."

ROCKAWAY DOES NOT RELY ON FEDERAL LAW

Rockaway's Ord. § 54-100 L. (in support of grant condition)

"Wetlands. The connection of any structure, to the Rockaway Valley Regional Sewer Authority sewer system, on lands classified as wetlands is prohibited **unless a waiver is granted by said Authority**. For the purpose of administering this provision wetlands are delineated on a set of municipal tax maps available for inspection at the office of the Township Engineer. Any lands designated as wetlands may be counted as part of a tract acreage for the purpose of computing the maximum density permitted in the zone in which it is located."

42 U.S.C. 2000d-2

See Appendix I - Page 43

40 CFR Ch. I, Subpart F, §35.925-13 (E)

See Appendix I - Page 44

N.J.S.A. 40:48-2:

See Appendix I - Page 43

STATEMENT OF THE CASE

The RVRSA accepted a contract condition from the EPA that prohibits them from allowing owners of wetland lots to connect to the sewer system. As a result of this contract condition, EPA, RVRSA, and Rockaway violates the CWA and a Title VI regulation that requires them to provide sewer service to any beneficiary. To obtain relief, petitioner was required to seek a waiver from NJDEP and EPA. That waiver was denied based on EPA's policy to deny due process and equal protection.

The EPA filed a prediscovery motion to dismiss based on the statute of limitations and sovereign immunity. Petitioner filed a cross-motion to enforce Title VI and equal protection.

The district court failed to consider petitioner's continuing violation theory to find limitations had run. The court later granted EPA summary judgment on its denial of a waiver, thus reaching the merits. The district court failed to consider facts, theories and case law. Its decisions conflict with Supreme Court, Court of Claims, and Circuit Court decisions on the issues. The court shows a partiality toward the defendants that is prejudicial.

APPELLATE REVIEW - The Third Circuit affirmed the district court's decision and declined to grant petitioner a rehearing en banc. The panel was asked to consider rehearing, but declined. The Third Circuit abused it discretion by affirming a decision that would override decisions of this Court and other Circuits, and by not reviewing de nova; applicability of statute of limitations, Ind. Con. Corp. v. US Bur. of Rec., 15 F.3d 963, 967, summary judgment ruling, G.D. v. West. Sch. Dist., 930 F.2d 942, 946, the evidence, Jibson v. Mich. Ed. Assoc., 30 F.3d 723, 729 and jurisdictional questions. Adams v. Trust., NJ BR. TR., 29 F.3d 863, 869. The Court's affirmation also sanctions a departure by the lower court that requires this Court exercise its supervisory power.

REASONS FOR GRANTING THE PETITION

I - STATUTE OF LIMITATIONS ERROR

SUMMARY - The district court abused it discretion by not considering facts [1] that prove a continuing violation, and by not deciding the continuing violation argument. [2] The court's decision also conflicts with rulings by this Court and other Circuits.

FACTS - The court abused its discretion by not considering facts in briefs on summary judgment as binding judicial admissions. City Nat. Bank v. U.S., 907 F.2d 536, 544 (5th. Cir.1990). Regulation 40 CFR Ch.I, Sub.F, §30.600(E) is violated on it face by the terms of grant condition 4(b), which is rendered void by **"failure to comply with regulations is a fatal flaw to administrative action."** Vitarelli v. Seaton, 359 U.S. 535, 539 (1959). Petitioner being denied the benefit of his assessment by a condition that bars compliance with regulation (App.F, p.39). Cape May Greene, a case argued by both sides, held a grant condition to deny sewer service violates the CWA. The court was arbitrary and irrational by disregarding facts on a violation of regulation, as it applies to a tolling doctrine. West v. Phil. Elec. Co., supra. The court's handling of the grant condition conflicts with a ruling by this Court. [3]

---

[1] Abuse of discretion means serious error of judgment, such as, relying on forbidden factor or failure to consider an essential factor. Kasper v. Bd. of El. Com., City of Chicago, 814 F.2d 332, 339 (1987).

[2] Review jurisdictional questions and court's interpretation of tolling doctrine. Adams v. Trust., NJ BR. TR., 29 F.3d 863, 869.

[3] The "injury in fact" in an equal protection case of this variety is the **denial of equal treatment resulting from the imposition of the barrier**, not the ultimate inability to obtain the benefit." Fla. Gen. Contractors v. Jacksonville, 124 L.Ed 2d 586, 597.

CONTINUING VIOLATION - The court also disregarded memos that show the grant condition is based on contract, thus unable to prevent enforcement of the regulation (pages 23 & 24) (App.K&L).[4] Those memos prove a continuing violation of regulation. The court abused it discretion by not considering the memos, violation of regulation, holdings of Cape May Greene, and by not ruling on the continuing violation theory,[5] thus denying petitioner a substantial right.[6]

Not considering a continuing violation conflicts with the following cases. Continuing violation theory applied in contract matter. Merchants & Marine Bank v. Douglas-Guardian Corp., 801 F.2d 742 (5th.Cir.1986). **"Wooden application of . .** (limitations), **which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act."** Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-381 (1981). **"One should not be allowed to acquire a right to continue the tortious conduct. It follows logically that statutes of limitation should not run prior to its cessation."** Page v. U.S., 729 F.2d 818, 821-822 (2nd.Cir. 1984). Policy contrary to law was subject to review even after limitations ran. Public Citizen v. Nuc. Reg. Com'n, 901 F.2d 147, 152-153 (D.C.Cir. 1990).

---

[4] Documentary exhibits would constitute matrices of opinion in lieu of findings of fact. WOFAC Corp. v US, 269 F.Supp. 654 (1967).

[5] Dent v. Cunningham, 786 F.2d 173, 175 (application of legal precepts); Gibney v. Toledo Bd. of Ed., 596 N.E.2d 591, 598 (refusal to decide an issue is an "abuse of discretion").

[6] District court abuses its discretion when action taken is improvident and affected substantial rights of the parties. Goetz v. Crosson, 41 F.3d 800.

LIMITATIONS BEGINS when an agency review is final, even though the initial challenging period is over. Crown Coat Front Co. v. U.S., 386 U.S. 503, 511-512 (1966); Wind River Min. Corp. v. U.S., 946 F.2d 710, 716 (9th.Cir.1991); Impro Products, Inc. v. Block, 722 F.2d 845, 850 (D.C.Cir.1983); White v. Secretary of Army, 629 F.Supp.64, 68 (D.C.Cir.1984). The court's holding that the statute began to run with the imposition of the grant condition overrides these authorities. Hence, EPA's final agency action on May 5, 1989 (date of EPA review required by grant condition 4.b.,p.2) (App.H,p.42) makes petitioner's action filed on Jan. 27, 1994 timely in accordance with 28 U.S.C. 2401(a). Petitioner was never notified of the condition, having bought the land after it was imposed. So, he was not materially affected until the grant waiver was denied. Therefore, the district court's decision also conflicts with Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1966) (controversy is ripe when agency action materially impacts challenging party).

The RVRSA and its municipal members violated Title VI by accepting an arbitrary grant condition contrary to a duty not to violate the regulation, to keep the EPA from overstepping its lawful authority, [7] and to protect its inhabitants interests in their capacity as trustees for the public.[8] Therefore, they are separately liable for their violations of duty irrespective of EPA's immunity.

---

[7] "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. "Federal Crop Ins. Corp v. Merrill, 332 U.S. 380, 384 (1947).

II - TITLE VI JURISDICTION ERROR

SUMMARY - The court made a legal error as to Guardians, and overrides other cases that hold petitioner to be a third party beneficiary to the grant. The court also failed to review the regulation to determine its jurisdictional requirements.

TITLE VI JURISDICTION - Petitioner, as the owner, paid an assessment entitling him to sewer service [9] (App.F,p.39). EPA imposed a condition that led the RVRSA to deny sewer service, in violation of a regulation to provide it (App.H,p.41). **"Violation of the . regulations required a reversal of the denial of benefits."** Matthews v. Rail. Ret. Bd., 472 F.2d 1176 (5th.Cir.1973). EPA knew the Court of Claims held a denial of service by EPA to be a taking, making their condition a deliberate denial of equal protection. In support of his Title VI argument, petitioner argued Guardians. That Court found a recipient could be **"administering the program in violation of the statute or regulations."** Guardians @ 598. That Court preferred enforcement of the regulation, which it found to be separate from the statute:

---

[8] "A municipality, at least as to contracts to which it is a party, occupies the position of a ***trustee*** for its inhabitants, and "it is its plain duty to protect the rights of [its] inhabitants * * *, the public, the community * * *." Boonton Mayor, etc. v. Boonton Water Co., 69 N.J. Eq. 23, 24 (Ch. 1905), aff'd 70 N.J. Eq. 692 (E. & A. 1906). We see no reason why this "plain duty" should not extend to protect all the public rights of the residents of the municipality." State of New Jersey v. East Shores, Inc., 194 N.J. Super. at 537

[9] "An assessment is imposed for an improvement specially beneficial to the individual property assessed and can only be justified when proportioned to such benefits. **Absence of benefit precludes assessment**. Maywood Land Co. v. Rochelle Park, 13 N.J.Misc. 842.

> "Thus, a majority of the Court would hold that **proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself."** Guardians Ass'n. v. Civil Service Comm'n. N.Y.C., 463 U.S. 582, 608 n. 1 (1982); Cannon v. Univ. of Chicago, 441 U.S. 677, 722, 99 S.Ct. 1946, 1970, 60 L.Ed.2d 560 (1979). (emphasis added)

This holding creates a private right of action to enforce a regulation by those adversely affected by its arbitrary administration. The 7th. Circuit in conformance with Guardians, accepted the jurisdiction contained in a regulation, but dismissed a statutory claim when its requirements were not met. Gomez v. Ill. St. Bd. of Ed., 811 F 2d. 1030, 1044-1045 (7th.Cir.1987). So, the district court made a legal error regarding Guardians and also overrode Gomez. It used the statute's requirements to bar enforcement of a regulation, instead of looking to the regulation, which represents an improper application of law to fact. Valenti v. Mitchell, 962 F.2d 288, 299 (3d.Cir. 1992). The district court also disregards factors that should be given great weight, thus abusing its discretion. U.S. v. Kramer, supra.

The court's jurisdictional bar also conflicts with decisions that make petitioner a third party beneficiary. [10] Hence, the court denies petitioner his entitled review, and also denies him the protection of a regulation having the force of law. U. S. v. Nixon, 418 U.S. 683, 695 (1974).

---

[10] **"Private parties function as third-party beneficiaries to these [Title VI] contracts."** Guardians at 633; Lau v. Nichols, 414 U.S. 563, 571n.2 (1974); Soberal- Perez v. Heckler, 717 F.2d 36, 39 (1983).

BASIS FOR ENFORCING THE REGULATION - 40

CFR Ch. I, Subpart F, §30.600 (E) is clear:

> **These authorities prohibit you from excluding any person from participating in, denying them the benefits of . . . any program or activity involving federal financial assistance."** (emphasis added)

The regulation interprets the CWA and Title VI as not denying the benefit to any person. Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1966) (regulations interpret statutory provisions). Mr. Hargrove's memo proves he relied on contract, not federal law, **". . they can also enter into contracts with the EPA through grant agreements. These contracts stand on the same footing as contracts between natural persons or municipalities"** (App.K,p.47). By prescribing a denial of due process, Mr. Sullivan proves he had no authority. (App.L, p.57). EPA admits RVRSA accepted its grant condition in their facts not in dispute. Grant conditions must be unambiguously imposed by Congress. Pennhurst St. Sch v. Halderman, 451 U.S. 1, 17 (1980). RVRSA violated its duty to Title VI by accepting and carrying out a condition that remains vague as to Congress' intent, thus remaining a contract condition that cannot preempt the duty to comply with regulation. Chapman v. Houston Welf. Rights Org., 441 U.S. 600, 99 S.Ct. 1905 (Federal rights limited to statute, regulation and treaty). The court abused its discretion by failing to consider these memos, as they apply RVRSA's duty and the grant condition as a barrier to equal protection, Fla. Gen. Cont., supra.

The regulation identifies "any person" as a beneficiary. The Supreme Court held all beneficiaries to be third parties to Title VI grants. A more limited reading of the regulation is contrary to the holding and Congress' intent for this regulation:

> "As to each assisted program or activity, ***title VI will require an identification of those persons whom Congress regarded as participants and beneficiaries,*** **and in respect to whom the principle declared in title VI would apply."** 110 Cong. Rec. 1521. Carmi v. Metro. St. Louis Sewer Dist., 620 F.2d 672, 675 n.4 (1980); Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1236 n.17 (1980). (emphasis added)

By denying a Title VI review, the court allows the Regional Administrator's grant condition to prevent enforcement of the regulation that defines his duty and petitioner's rights as a beneficiary. US v. Shimer, 367 U.S. 374, 377 (regulations define an administrator's duty). The Regional Administrator for Region II relies on a grant condition to obviate his duty, but that condition is in violation of the regulation, making that contract condition unenforceable. Burt v. Union Cent. L. Ins. Co., 187 U.S. 362, 23 S Ct 139. Denial of sewer service is also considered a taking. Unpublished Case, 220 Ct. Cl. 605, 611 (4/6/79). The proposition that emerges is that the EPA takes private property to preserve wetlands without paying compensation, though contrary to the CWA and regulation. EPA's grant condition is contrary to regulation, making it is illegal and of no affect. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); U.S. v. Nixon, 418 U.S. 683, 695-6 (1974); Service v. Dulles, 354 U.S. 363, 372-73 (1957).

III - WAIVER OF SOVEREIGN IMMUNITY

SUMMARY and ARGUMENT - The district court reviewed petitioner's brief for a waiver of immunity. It reviewed and rejected some, but not all, proving the remainder of the waivers were not considered, which is "arbitrary and irrational." West v. Phil. Elec. Co., 45 F.3d 744, 752 (3rd. Cir. 1995). Overlooking arguments that included the CWA waiver resulted in a jurisdictional bar on technical grounds, thus affecting the outcome and a substantial right. Lockhart v. West. Credit Corp., 879 F.2d 43, 53, 59 (3d Cir.1989). It results in an "abuse of discretion" by failing to consider an essential factor. Kasper v. Bd. of El. Com., supra..

WAIVER OF IMMUNITY IN CWA - Failure to consider the CWA waiver, in effect, overrides this Court's finding a waiver to exist in the CWA (Clean Water Act), which the EPA alleges to be the source of its authority. U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 617-621 (1992). Petitioner's Title VI action is against the Reg. Admin. for Region II, RVRSA and Rockaway. Idaho Cons. League, Inc. v. Russell, 946 F.2d 717, 719 (9th.Cir. 1991). The waiver in the citizens suit section allows a civil action in a district court, and 33 U.S.C. §1365(e) does not restrict an action under another statue:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek . . any other **relief** (including **relief against the Administrator** or a State Agency)."

Three things are clear. First, the word "relief" includes damages. Franklin v. Gwinnett Cnty. Pub. Schs., 112 S.Ct. 1028, 1034-1035 (1992). Section 1365(2) also provides for damages in the phrase **"amount in controversy."** Wabash Ry. Co. v. Vanlandingham, 53 F.2d 51, 51; Howard Iron Works v. Buffalo Elevating Co., 81 N.Y.S. 452, 459. Second, Congress named the Administrator in his official capacity, which is **"another way of pleading an action against [the governmental] entity of which an officer is an agent."** Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell v. N.Y.C. Dept. of Soc. Svc., 436 U.S. 658, 690 n.55 (1978). See; Hafer v. Melo, 112 S.Ct. 358, 361 (1991). Third, 505(e) provides **"relief against the Administrator"** under any statute, which makes a review under 42 U.S.C.§2000d-2 appropriate, based on:

> "[A]ny department or agency action . . . shall be subject to such judicial review *as may otherwise be provided by law* for similar action taken by such department or agency on other grounds."

Title VI provides a review and preserves the right to a judicial review provided by other laws without having to file that action. Gardner v. St. of Al., Dept. of Pensions & Security, 385 F.2d 804 (1967). The EPA disregards Cape May Greene and the Ct. of Claims holding, and the principle that violating a regulation renders the condition void. It allows a condition based on contract to prevent enforcing a regulation. After complying with Cape May Greene by abandoning the practice in that case, they resurrect it for the RVRSA, thus keeping the grant condition

from being moot. Dermott Sp. Sch. Dist. of Chicot Cnty. v. Gardner, 278 F.Supp. 687 (1968). Title VI is concerned with limiting arbitrary agency power, thus it applies here. Alabama NAACP St. Conf. v. Wallace, 269 F.Supp. 346, 351-52 (1967). EPA's violation of regulation and equal protection requires a review under 2000d-2. Salvador v. Bennett, 800 F.2d 97, 99 (7th.Cir.1986). If petitioner's misapprehends the law or his complaint is deficient, he humbly asks the Court to remand with leave to amend, since the facts supporting a Title VI violation also prove a CWA violation, thus providing colorable grounds for relief. Hahn v. U.S., 757 F.2d 581, 587 (3d Cir.1985); Williams v. Little Rock Wat. Wks, 21 F.3d 218 (8th.Cir.1994).

EPA's VIOLATION OF CWA - Setting effluent standards is not discretionary. Scott v. City of Hammond, Ind., 741 F.2d 992, 997 (1984). Instead of maintaining the effluent standard, the Administrator imposed a grant condition in violation of regulation and equal protection to deny it. This violates the CWA, Cape May Greene, just as it violates the regulation, U.S. v. Nixon; Vitarelli v. Seaton, supra., which violates 33 U.S.C. 1365(a)(2). Greene v. Costle, 577 F.Supp. 1225, 1232 (1983). The Administrator deliberately abdicated his statutory duty. U.S. v. City of Det., 720 F.2d at 451 (1983).

The Administrator has the authority to require pretreatment of toxic effluents that are discharged into publicly owned treatment works. 33 U.S.C. §1317. This authority allows him to issue an order against violators that is subject to a Presidential review. However, no distinction exists between the sewage

generated by homes on wetland lots, versus regular lots, to warrant a denial of service under this statute. Furthermore, using a grant condition instead of an order overreaches his authority by avoiding the order that would trigger a Presidential review. This violation further supports Cape May Greene and proves EPA has no authority under the CWA to deny sewer service, as claimed.

These facts supports the following inference. The preceding review shows that wetland lots are not one of the class covered by this statute since they cannot discharge pollutants into publicly owned treatment works. Furthermore, the class exists for the sole purpose of denying service to prevent construction. Nor does the statute provide authority to use a grant condition to further its goals. To the contrary, it requires an order that is subject to a Presidential review to avoid arbitrary conduct. In order to circumvent this limitation, Mr. Hargrove developed a concept based on contract that is arbitrary and also violates the safeguard built into the statute, so as to disguise illegal conduct in order to take property while avoiding damages and discovery.

EPA then involved the RVRSA by using terms that force compliance with the law to aid in its violation. Besides, a Title VI action could be defeated by arguing that the denial of service is not racial, resulting in a district court relying on the statute instead of the regulation, as in this case. It is scary to see how easy it was for two people to violate the law and involve other agencies in that violation, causing petitioner a great deal of time, money and twelve years of continuing aggravation.

IV - SUMMARY JUDGMENT

SUMMARY - The district court abused its discretion by treating clarification as though it were reconsideration, and by not considering essential factors. Kasper v. Bd. of El. Com., supra.

THE CASE WAS OVER - EPA was granted its primary relief, but moved for clarification on its alternative relief. The district court abused its discretion by granting reconsideration when only clarification was requested. Gillette Tire Jobbers v. App. Ind., Inc., 596 F.Supp. 1277 This conflicts with a Circuit holding that **"clarification does not change . . but merely restates . ."** Mikel v. Gourley, 951 F.2d 166, 169 (8th. Cir.1991). The court also overrides the principle that once a case ends that no further changes can be made. Mallory v. Eyrich, 922 F.2d 1273, 1282 (6th.Cir.1991). The court filed its appealable order denying petitioner's motion for reconsideration on June 19, 1995 in accordance with Rule 79(b), thus ending the motion. The Appellate Court docketed the case on June 28, 1995 in accordance with Rule 4.(a)(1), as final. Therefore, the order of Aug. 24, 1995 was based on EPA's motion for clarification (App.C, p.31). The court "sua sponte" converted a motion for clarification to reconsideration, thus denying petitioner notice and the chance to defend. Gioia v. Blue Cross Hosp. Svc. Inc. of Mo., 641 F.2d 540, 542 (1981). Both court opinions hold the grant condition protects wetlands in support of EPA's denial of sewer service. However, those opinions conflict with a Court of Claims holding that a denial of sewer service represents a taking. Unpublished Case, 220 Ct. Cl. 605, 611 (4/6/79).

APA REVIEW- The court disregarded essential facts, Kasper v. Bd. of El. Com., supra., by disregarding evidence contrary to an evidentiary standard that would apply at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

The court disregarded two memos (App.K,p.48), (App.L, p.57). One shows the grant condition is based on contract, which is arbitrary. Antilles Ind., Inc. v. Gov. of Vir. Isl., 388 F.Supp. 315, 321. The other prescribed negotiating with the state to deny due process on waiver requests, proving unconstitutional agency action that violates the APA. Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y.1980). These memos contain material facts that affects the court's APA review, that were not considered.

Petitioner presented the court with the fact that regulation 40 CFR Ch. I, Subpart F, §30.600(E. is violated on its face by the grant condition 4.(b. The court abused its discretion by disregarding it, since the regulation would render the condition void since **"failure to comply with regulations is a fatal flaw to administrative action."** Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Kelly v. Railroad Retire. Bd., 625 F.2d 486, 492.

Even if EPA's immunity is not waived, those memos prove they went beyond violating a regulation, just as a comparison of the condition and regulation shows the condition to be the sole obstacle to enforcing the regulation. Their conduct proves a denial of due process and equal treatment. It proves, RVRSA and Rockaway's liability for violating a Title VI regulation and by failing to keep the EPA from overstepping its lawful authority. Federal Crop Ins. Corp v. Merrill, 332 U.S. 380, 384 (1947),

EPA's DELIBERATE VIOLATION - The EPA claimed two cases supported its right to impose a grant condition. Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3rd.Cir.1983), and Shanty Town Assoc. Ltd. Part. v. E.P.A., 843 F.2d 782 (4th. Cir.1988). EPA admits it lacks authority to regulate sewer service directly. Shanty Town, supra.@ 789. The EPA implies indirect authority. Ordinarily pre-emption may be implied.[11] However, there is one notable exception that the court overrides, **"[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously"**. Pennhurst State School & Hospital v. Halderman, 451 U.S. at 17. The EPA makes a general reference to the CWA. However, they fail to present a specific section that meets that requirement. Whereas, the regulation that extends Title VI protection to petitioner, underwent a rigorous review. [12] Hence, the regulation has the force of law. U.S. v. Nixon, 418 U.S. 683, 695 (1974).

The court gave no weight to Cape May Greene finding the grant condition violates the CWA, **"It is also clear that EPA is using its power to regulate grants under the Clean Water Act to accomplish matters not included in that statute"** and **"EPA's ban was not directed at the operator of the sewage plant or its appurtenances, but rather to customers who would be serviced by the plant -- people who are not directly subject to**

---

11 Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

12 "Title VI enforcement regulations **incorporating a disparate-impact standard** had been drafted by a **Presidential task force** and the **Justice Department**, and **every Cabinet Department** and about **40 federal agencies** had adopted standards **in which Title VI was interpreted** to bar programs with a discriminatory impact." Alexander v. Choate, 469 U.S. 287, 295 n.11; Guardians, supra., at 592, n.13.

EPA authority." Before deciding, the Court quoted EPA: **"EPA is not the empowered agency with jurisdiction to change, enforce or control local land use."** and **"A sewer hookup ban as a condition to the grant would, we believe, be neither appropriate nor effective,"** *id. at* 182. These admissions show EPA was aware of its limitations, but chose to overreach its authority.

If it were to stand, the court's order would override a ruling on a taking: **"EPA has appropriated . . . contractual rights to sewage services"** and **"imposed . . regulatory burden on the use of plaintiff's property"** as well as **"prevented . . the sanitary agency . . . from providing additional sewage treatment services, either now or in the future, that may be needed to enable the fulfillment of their contractual obligation under the sanitary district agreement."** Unpublished Case, 220 Ct. Cl. 605, 611(4/6/79). Furthermore, the CWA does not prescribe taking property to accomplish its goals. EPA's violation of equal protection, statute, and regulation forecloses a taking claim. Florida Rock Ind., Inc. v. U.S., 791 F.2d 893, 898 (Fed.Cir.1986). The only way to restore those injured is damages.

The Court of Claims decision was rendered six weeks before EPA imposed its grant condition in Cape May, so it had the opportunity to desist. (App.L,p.57). The EPA's denial of service led to the Cape May Greene decision on other grounds, giving it a second chance to desist. This Court is the third to address the denial of sewer service, but the first on the grounds that it violates Title VI and equal protection.

These facts support the inference that the EPA disregards its limitations and judicial holdings to achieve goals caused by internal pressures (App.L, p.52). The EPA looses nothing by violating a court's holdings and trammeling our rights in the process since they rely on sovereign immunity. Hence, the EPA did not foresee any liability for damaging petitioner and his class.

CONSTITUTIONAL VIOLATION - EPA violated equal protection to take wetland lots by disregarding the Court of Claims holding. [13] By negotiating a denial of due process with this state and compelling a violation of regulation with its grant condition, it used state action to conceal its denial of due process and equal protection. (App.L, p.57). Had the RVRSA and Rockaway adhered to the duty in the regulation, the duty of determining the limits of EPA's authority, and protecting the interests of its inhabitants, then there would be no violation. Disregarding these duties makes them liable. The court's decision would override law on their duty, if the RVRSA and Rockaway are not held liable for their breach of duty.

The preceding supports the following inference. The EPA disguised its taking to avoid compensation by negotiating a denial of due process with the state. It also violated a regulation proving it had no legitimate reason for the taking in the first place. Whereas, the RVRSA (including its municipal members) were so concerned with loosing the grant that it disregarded several different and distinct duties to the public.

---

13 Equal protection violation implies that the decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on an identifiable group. Shango v. Jurich, 681 F.2d 1091, 1104 (1982). Cited in David v. Lane, 839 F.2d 1265, 1271-72 (1988).

The district court gave no weight to EPA's admitted violation of due process by negotiating denials of waiver requests (App.L, p.57). NJDEP having recommended denial of a waiver after petitioner was granted an exemption to N.J.'s Wetlands Act. The NJDEP's recommendation to deny sewer service was arbitrary and capricious since it violates the principles in Title VI.

The foregoing supports the inference that the EPA negotiated a denial of due process with the NJDEP to create the appearance of state action, in order to conceal its taking. A consensus involving the EPA, NJDEP and RVRSA also creates a front which causes a court to not seriously consider the allegations of individuals. Or, upon recognizing the injury done by a federal, state, and local agency that a court would rather abuse its discretion rather than have those violations made public.

The court overlooked EPA's denial of equal protection, [14] which conflicts with a holding of this Court. The court overrides law that applies to EPA's denial of this state's independence.[15]

---

[14] The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." Fla. Gen. Contractors v Jacksonville, 124 L.Ed 2d 586, 597.

[15] "the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States--**independence in their legislative** and **independence in their judicial departments**. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. **Any interference with either,** except as thus permitted **is an invasion of the authority of the State and, to that extent, a denial of its independence.**" Erie R. Co. v. Tomkins, 304 U.S. 64 (1937).

First, by negotiating a denial of due process with the NJDEP. Second, causing the municipal members of the RVRSA to legislate a local ordinance to justify the denial of sewer service, since they are prohibited from acting in support of a contract condition. [16] So, Rockaway's Ordinance § 54-100 L violates equal protection, case law, and a state statute. [17] The fact that the ordinance does not rely on federal law supports the inference that RVRSA and Rockaway knew that no federal authority existed. .

---

16 "Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the **legislative function** may not be surrendered **or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts."** Collins v. Board of Adjustment of Margate City, 3 N.J. 200, (1949); Speakman v. Mayor and Council of North Plainfield, 8 N.J. 250 (1951).

17 **N.J.S.A. 40:48-2**: "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws **not contrary to the laws of this state or of the United States**, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants , and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." (emphasis added)

V - UNLAWFUL GRANT CONDITIONS

SUMMARY and ARGUMENT - The court reached the merits, since an APA review can address unconstitutional conduct, Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y. 1980), and violations of regulation, Vitarelli v. Seaton, 359 U.S. 535, 539. Hence, this Court can address the issues.

EPA's grant classification of wetland lot owners violates equal protection. [18] That classification is arbitrary since the grant condition advances unlawful goals contrary to this Court's holdings, in four ways.[19] First, the condition violates the regulation, though the regulation preempts the condition, Chapman v. Houston Welf. Rights Org., supra. Second, taking private property in the guise of regulation. Unpublished Case, 220 Ct. Cl. 605, 611(4/6/79). Third, Cape May Greene found the grant condition violated the CWA before it was imposed on RVRSA. Fourth, by negotiating a denial of due process with the state, the EPA intentionally discriminates against wetland lot owners. Therefore, the court's decision conflicts with a principle that applies to grant conditions.

EPA memos that were before the court show the EPA grant condition was arbitrary from the onset, but took a turn for the worse when they deliberately violated due process. These memos, reviewed in more detail in the next argument, show how easy it is for a federal agency to violate the public's rights as compared to what the legal process demands to prove these violations.

---

18 Harris v. McRae, 100 S.Ct. 2671, 2691 (1980).

19 Chas. Steward Mach. Co.v. Davis, 301 U.S. at 593.

VI - ESSENTIAL FACTS NOT CONSIDERED

SUMMARY and ARGUMENT- The court abused it discretion by not considering essential facts. [20] Kasper v. Bd. of El. Com., supra. Two of the 24 exhibits supporting Mr. Hargrove's certification represent the underpinnings of EPA's grant condition that meets the evidentiary standards that apply at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252.

Mr. Hargrove's certifies a federal mandate prompted the grant condition. That claim violates FRCP 56(g) as being in bad faith, since his 1979 memo fails to cite any federal authority to support his certification. His memo relies entirely on contract, thus proving his certification false and his condition arbitrary.[21] It also contains proof of a Title VI and equal protection violation in the phrase, **"The question of allowing hook-ups rests with both the authority and the municipalities."** (App.K,p.47). Mr. Sullivan, to whom that memo was directed, violated due process in support of that condition by negotiating with state agencies to have them deny grant waiver requests (App.L,p.57). Therefore, EPA's defense is frivolous by claiming authority under the CWA, contrary to their own evidence.

The court failed to consider essential facts by not reviewing the evidence that supported summary judgment. [22] The court overlooked material facts for trial, grounds to support a continuing violation theory, proof of a violation of regulation, and grounds for summary judgment in petitioner's favor.

---

[20] Documentary exhibits would constitute matrices of opinion in lieu of findings of fact. WOFAC Corp. v US. 269 F.Supp. 654 (1967).

[21] 'Administrative action is deemed **"arbitrary"** if it is taken without **any authority of law or upon a misconstruction of the statutory authority** under which it purports to be taken. Antilles Ind., Inc. v. Gov. of Vir. Isl., 388 F.Supp. 315, 321, (D.C.Vir.Isl.)

[22] Pettinaro Const. Co. v. Del.Auth. Reg. Tr., 500 F.Supp. 559.

These facts support the inference that Mr. Sullivan conceals the arbitrary grant condition by involving the state in a denial of due process to make it appear that EPA was cooperating with the state, which might prevent closer examination of Mr. Hargrove's condition. If Mr. Sullivan were proceeding under preemptive federal authority, there would be no need to involve the state, or deny due process in the first place.

Mr. Hargrove perjures himself to mislead the court, by making it appear that he had legal justification for the condition he concocted (App. M, p59). Mr. Sullivan's memo shows the arbitrary grant condition was used in Cape May's grant, proving it to be the same condition in Cape May Greene, the case that found the grant condition violated the CWA. A case the court disregarded. The court also overlooked Mr. Sullivan's unconstitutional denial of due process. Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y.1980). The EPA's conduct proves a wanton disregard of public rights. A Third Circuit holding on "wanton disregard" is suited to the EPA's conduct. [23] The EPA's reliance on immunity proves an indifference to consequences.

I respectfully submit that the court's failure to consider evidentiary facts that are admissible at trial is arbitrary and irrational. West v. Phil. Elec. Co.,supra. By so doing, the court denied petitioner substantive due process.

---

[23] Third Circuit holds "wanton misconduct" to be the intentional doing of an act of unreasonal character, in disregard of a risk to actor or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow, and is usually accompanied by a conscious indifference to consequences. Thompson v. Pa. Power Co., 402 F.2d 88, 91.

VI - ROCKAWAY'S FRAUD ON THE COURT

SUMMARY and ARGUMENT - The district court did not consider all the facts that prove Mr. Bell committed a fraud upon a state court. Kasper v. Bd. of El. Com., supra. Mr. Bell having concealed facts from petitioner that would toll limitations, in order to obtain a statute of limitations dismissal. The court realized that Mr. Bell admitted the town's fraud, but failed to realize these facts show he lied earlier to a different judge. Valenti v. Mitchell, 962 F.2d 288, 299 (3d.Cir. 1992) (erroneous finding of fact, errant conclusion of law). The district court held that plaintiff's claim was dismissed by the doctrine of collateral estoppel in its bench opinion. That decision overrides a Supreme Court ruling that fraud destroys the validity of everything into which it enters. It affects fatally even the most solemn judgments and decrees. Nudd v. Burrows, 91 U.S. 426, 440 (1875); Diehl v. U.S., 438 F.2d 705, 709 (1971).

FRAUD BARS RES JUDICATA - Mr. Bell, the Township attorney, represented Rockaway and stated the following in his brief to Judge Harper, "**The Township of Rockaway was prepared to grant an endorsement of his request *when said restriction was brought to the Municipal Attorney's attention by the Municipal Engineer.***" (App.J1,p.45). Mr. Bell states the Council was unaware of the grant condition's existence until he informed them of it, after the engineer told him. This is refuted by his admission in a different brief, "**Mr. Fernandes admits, by his own affidavit, that he knew of the EPA Grant Condition (and the Township's concealment of same and decision to sell despite it).**" (App.J2,p.45). The district court found Mr. Bell admitted the Council's fraud and knowledge of the condition.

The court failed to realize this statement shows he lied before, since he could not inform the Council of the grant condition since they knew about it. During oral argument, Mr. Bell blurts out, **"That doesn't mean we didn't,"** when the judge stated **"But he didn't know, he thought it** [grant condition] **came on after he got the property"** (App.J3,p.45). By using "we," it shows that he knew the grant condition existed well before his earlier statement. How then, could the engineer inform him of the grant condition, when Mr. Bell admits knowing about it, the town's knowledge of it, and the town's fraud ? The district court would be correct on collateral estoppel if Mr. Bell merely admitted the town's fraud. However, his admission shows he lied to the first judge, proving he committed a fraud.

Mr. Bell's admission of a fraud is admissible against Rockaway. Purgess v. Sharrock, 33 F.3d 134, 144 (2d.Cir. 1994); U.S. v. McKeon, 738 F.2d 26 (2d.Cir.1984). Therefore, it can be used to bar Rockaway's res judicata defense in this case, while holding Mr. Bell liable for a fraud that concealed grounds for tolling limitations in the former case. Mr. Bell affected the outcome of the first hearing by lying, which controlled the second hearing. Lockhart v. West. Credit Corp., 879 F.2d 43, 53, 59 (3rd Cir.1989). Mr. Bell fraudulently concealed and misrepresented facts to gain a jurisdictional bar. Isreal Aircraft Industries v. Standard Precision, 72 F.R.D. 456, 463 (1976).

Council knew about the grant condition since December 1984, when, in support of it, it approved ordinance 54-100L to deny sewer service. (App.G, p.40). Comparing Appendix D5 to

D6 will show Council removed a reference to a wetland lot (Schedule attached to resolution for public auction) in an attempt to commit another fraud in 1990. Consistent with this, Mr. Bell admits the Council concealed the grant condition to defraud the public in 1985, after gaining the bar of limitations. In June 1988, Mr. McKinnon (engineer) stated the Council refused to endorse a waiver since ***"the Township's policy,* at that point of time was, if the structure, in fact, was in the Wetlands, *it was denied"*** (App.J7,p.45 township minutes). The engineer recalls a Council policy to deny endorsements, which violates the civil rights of those affected. There was no mention of his bringing the condition to Mr. Bell's attention. Yet, three years later, Mr. Bell and the engineer would have you believe the Council was unaware of the grant condition, contrary to the evidence. He would also have you believe it was the engineer that brought it to his attention. Mr.Bell's statements supports the inference of a fraud by him and Rockaway. The court's failure to comprehend Mr. Bell's fraud on the state court led to res judicata, instead of rejecting that defense as frivolous in light of his fraud and the admission of a custom [24] to defraud the public. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 245 (1943). The court's error also represents an improper application of law to facts. NLRB v. Frazier, 966 F.2d 812 (3d.Cir 1992).

---

[24] "establish a policy or custom [by showing] a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality." Depew, 787 F.2d at 1499; see also Berlanti, 780 F.2d at 301.

Mr. Bell's fraud and the engineer's conduct supports the inference that they were concealing a Council policy of fraud and civil rights violations. A fraud that begins with EPA rendering numerous lots valueless, in terms of ratables. This led to a custom of selling these lots at public auction by concealing the grant condition in order to benefit from the sales proceeds. Council's denial of the endorsement that Mr. Bell referred to, was a way of running the statute of limitations to keep petitioner from appealing to state and federal agencies in order to prevent discovery of the fraud before the statute ran. This supports a fraudulent concealment theory by the Council. King & King Ent. v. Champlin. Pet. Co., 657 F.2d 1147, 1154 (10th.Cir.1981). This also explains why Mr. Bell concealed these facts by means of a fraud on the court and petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATE: 6 / 21 / 96

Nelson Fernandes

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5433 & 95-5646

NELSON FERNANDES,
Appellant

v.

ROCKAWAY TOWNSHIP, TOWN COUNCIL, AND TOWNSHIP ENGINEER; R.V.R.S.A (ROCKAWAY VALLEY REGIONAL SEWERAGE AUTHORITY); E.P.A. (ENVIRONMENTAL PROTECTION AGENCY); DORSEY & BELL; JOHN H. DORSEY; JOSEPH BELL
Respondents.

(D.C. Civ. No. 94-cv-00338)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,
Circuit Judge

Dated: May 13, 1996

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 95-5433 & 95-5646

NELSON FERNANDES,
Appellant

v.

ROCKAWAY TOWNSHIP, TOWN COUNCIL, AND TOWNSHIP ENGINEER; R.V.R.S.A (ROCKAWAY VALLEY REGIONAL SEWERAGE AUTHORITY); E.P.A. (ENVIRONMENTAL PROTECTION AGENCY); DORSEY & BELL; JOHN H. DORSEY; JOSEPH BELL

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 94-cv-00338
(Honorable William H. Walls)

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 15, 1996

Before: STAPLETON, SCIRICA and COWEN, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the district court's order entered May 15, 1995, letter-order entered June 20, 1995, and letter-order entered August 28, 1995, be and are hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,
Circuit Judge

if
Attest:
DP. Douglas Sisk, Clerk, March 26, 1996

APPENDIX C

Filed: August 24, 1995

Re: Nelson Fernandes v. Rockaway Town Council and Township Engineer, et al. Civil Action No. 94-338 (WHW)

Dear Counsel:

This matter is before the Court on Defendant Environmental Protection Agency's motion for clarification.

INTRODUCTION

On August 6, 1985, Rockaway Township held a public sale of real property by auction. Rockaway Township sold all property "as is" without any representations "as to the condition, area, or boundaries." Lot 8 was one of the land parcels on which the public bid. A portion of lot 8 was covered by environmentally sensitive freshwater wetlands.

On September 21, 1985, Plaintiff Fernandes won ownership of lot 8 by bidding $10,000.00. Fernandes had a title search done at the time of purchase. On November 15, 1985, Fernandes took title to lot 8 by deed recorded with the Morris County Clerk. Planning to build a single family dwelling, Fernandes hoped to connect the home to an adjacent municipal sanitary sewer line. However, his application for the connection was rejected because of a grant condition imposed by the federal government.

In 1983, the federal government gave Rockaway Township a grant so that the Township could build a sanitary sewer system. According to Grant Agreement No. C340389-04-02, **lots within an environmentally sensitive area ("ESA") cannot be connected to federally funded sewers. The purpose of the condition is to protect the surrounding wetlands.** Fernandes' request for a waiver from EPA's ban to connect to the sewerage system was denied.

In January 1994, Fernandes filed a Complaint naming the following defendants: the Environmental Protection Agency ("EPA"), the EPA Regional Administrator ("Regional Administrator"), Rockaway Township, Rockaway Town Council, Rockaway Township Engineer, Rockaway Valley Regional

Sewerage Authority ("RVRSA"), Dorsey & Bell Law Office, John Dorsey and Joseph Bell. All of the above-named defendants moved to dismiss plaintiff's Complaint. Fernandes cross-moved for a partial summary judgment. The EPA and the EPA Regional Administrator then moved for a partial summary judgment.

In its May 11, 1995 Order, this Court (1). dismissed with prejudice all of plaintiff's claims against defendants Rockaway Township Town Council and Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell, and Rockaway Valley Regional Sewerage Authority and its Executive Director, (2) dismissed without prejudice all of plaintiff's claims against United States Environmental Protection Agency and Regional Administrator of Region II and (3) denied plaintiff's motion for partial summary judgment. EPA's motion for partial summary judgement was not decided. EPA presently moves for clarification as to the status of its motion for partial summary judgment. The motion for clarification is granted and this Court will now proceed with its determination of the partial summary judgment motion.

DISCUSSION

The EPA requests a finding that its denial of Fernandes 1 grant waiver was not arbitrary and capricious. A reviewing court must set aside agency action deemed " to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. sec. 706(2) (A). The court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Stoeco Dev. . Ltd. V. Department of Army Corps of Eng'rs, 701 F.Supp 1075, 1080 (D.N.J. 1988), appeal dismissed, 879 F.2d 860 (1989) (quoting Citizens to Preserve Overton Park V. Volpe, 401 U.S. 402, 415-16 (1971)). However, the court is "not empowered to substitute its judgment for that of the agency." Td. The standard of. review is "highly deferential"; agency findings are "entitled to a presumption of regularity." Id.

Before granting a waiver application, the EPA must be assured that the proposed activities do not violate the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. Congress enacted the CWA in order to "restore and maintain the chemical, physical,

and biological integrity of the Nation's waters." 33 U.S.C. sec. 1251 (a). Thereafter, the discharge of dredged or fill materials from a point source into wetlands without a section 404 permit issued by the U.S. Army Corps of Engineers became prohibited. See 33 U.S.C. §§ 1311 (a), 1344.

Before granting a waiver application, the following factors are to be considered: (1) area extent of vacant parcel(s) which contain ESAs (i.e., floodplains and/or wetlands); (2) extent and ecological quality of ESAs affected; and (3) amount of existing development surrounding the parcel(s). See Exhibits to Declaration of Robert W. Hargrove, Exh. D. To obtain the necessary information, an inspection of the property was conducted in March 1989 at the request of the EPA. Id. at Exhs. N, 0. The inspection revealed extensive wetlands, several small streams running from the property into White Meadow Lake, and significant development of surrounding lots. Id. Based on the above data, the EPA denied Fernandes' waiver application. The EPA has offered to reevaluate Fernandes' application provided that a more recent site inspection is performed and information demonstrating that any sewer system connections will not jeopardize the wetlands is provided.. Id. at Exhs. Q, R.

Based on the above, this court finds that the EPA considered the relevant factors and made no "clear error" when reaching its decision. The site inspection conducted in 1989 did not reveal a significant decrease in wetlands warranting reclassification. The property continues to be predominantly wetlands and therefore continues to be protected under the Clean Water Act. The EPA's decision to protect the wetlands is rationally based on the available information. No contravening evidence is offered by the plaintiff.

Accordingly,

IT IS on this 24 th. day of August 1995 ;

ORDERED that the EPA's motion for clarification is **granted;** and it is further

ORDERED that EPA's motion for partial summary judgment is **granted.**

WILLIAM H. WALLS, U.S.D.J.

APPENDIX D

Dear Counsel: Filed: June 19, 1995

This matter is before the Court on plaintiff's motion for reargument.

INTRODUCTION

On August 6, 1985, Rockaway Township held a public sale of real property by auction. The terms of the public auction were that the property was sold "as is" and that "no representations of any kind are made by the Township of Rockaway as to the condition, area, or boundaries of the property herein relevant. " Lot 8 was one of the land parcels on which the public bid. A portion of lot 8 was covered by environmentally- sensitive freshwater wetlands. On September 21, 1985; plaintiff won ownership of lot 8 by bidding $10,000.00. plaintiff had a title search done at the time of purchase. On November 15, 1985, plaintiff took title to lot 8 by deed recorded with the Morris County Clerk. Plaintiff later purchased lot 9 which is adjacent to lot 8. He planned to subdivide the two lots and build a single family dwelling. plaintiff hoped to connect the single family home to the municipal sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government. In 1983, the federal government gave Rockaway Township a grant so that the Township could build a sanitary sewer system. According to Grant Agreement No. C340389-04-02, **lots within an environmentally sensitive area could not be connected to federally funded sewers. The purpose of the condition is to protect the surrounding wetlands.** plaintiff's lots are two of approximately 140 lost in the Township which were impacted by the EPA grant condition. plaintiff attempted to obtain a waiver from EPA's ban, but defendant Rockaway Valley Regional sewage Authority received a letter on May 5. 1989 from the EPA's Acting Regional Administrator denying the request.

All of the defendants moved to dismiss plaintiff's various claims against them. plaintiff cross-motioned for partial summary judgment. EPA, in addition to its motion to dismiss, moved for partial summary judgment against the plaintiff.

In its May 11, 1995 Order, this Court (1) dismissed with prejudice all of plaintiff's claims against defendants Rockaway Township Town Council and Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell, and Rockaway Valley Regional Sewerage Authority and its Executive Director, (2) dismissed without prejudice all of plaintiff's claims against United States Environmental Protection Agency and Regional Administrator of Region II and (3) denied plaintiff's motion for partial summary judgement. EPA's motion for partial summary judgement was not decided.

DISCUSSION

Under Rule 12(I) of the United States District Court Rules, the party moving for reargument must state "concisely the matters or controlling decisions which [said party believes the Judge or Magistrate has overlooked." Id. If the motion is granted, "the matter shall be reargued orally." Id.

The primary determination in a motion for reargument is whether "dispositive factual matters or controlling decisions of law" were overlooked by the Court. Pelham v. United States, 661 F.Supp. 1063, 1065 (D.N.J. 1987) . A motion for a reargument is not an opportunity for a party to present new arguments. Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1988). Where the Court has not overlooked facts and cases properly presented at the time of the motion, the Third Circuit has consistently denied relief. See Egloff v. New Jersey Air National Guard, 684 F.Supp. 1275 (D.N.J. 1988) . A party's disagreement with the Court's decision "should be dealt with in the normal appellate process, not on a motion for reargument." Florham Park Chevron, 680 F. Supp. at 163

Simply stated, plaintiff sets forth no matter or controlling decision which was overlooked by this Court. Therefore, plaintiff's motion for reconsideration is denied.

CONCLUSION

For the reasons set forth in this Letter Opinion, it is on this 19 th. day of June 1995

ORDERED that Plaintiff's motion for reargument be and hereby is denied.

WILLIAM H. WALLS, U.S.D.J.

APPENDIX E

BOYAR,,HIGGINS & SUOZZO, P.A. (JH 8207)

A Professional Corporation

10 Park Place, Suitte. 415
Morristown, New Jersey 07960
(201) 538-8008
Attorneys for Defendants, Rockaway Township
Town Council and Township Engineer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NELSON FERNANDES, Civil Action # 94-338(WHW)
Plaintiff,
ROCKAWAY TOWNSHIP TOWN
COUNCIL AND TOWNSHIP
ENGINEER, et al
Defendants .
x

ORDER DISMISSING AMENDED COMPLAINT AS TO ALL DEFENDANTS

THIS MATTER having been opened to the Court on March 27, 1995, honorable William H. Walls, U.S.D.J. presiding, upon defendants' motions brought pursuant to Fed.R.Civ.P.12(b)(l), Fed..R.Civ.P.12(b) (6) and Fed.R.Civ.P.56 to dismiss the Amended Complaint, by defendants, Rockaway Township Town Council and Township Engineer by Boyar, Higgins & Suozzo, P.A. (James J.Higgins, Esq. appearing); by defendants, United States Environmental Protection Agency and Regional Administrator of Region II, by the United States Department of Justice (Mark A. Rigau, Esq. appearing); by defendants, Dorsey & Bell, John Dorsey and Joseph Bell by Dorsey & Fisher (Douglas R. Cabana, Esq. appearing); and by defendants, Rockaway Valley Regional Sewerage Authority and Executive

Director, by McManimon & Scotland (Joseph Maraziti, Esq. appearing); and on cross-motion of plaintiff, Nelson Fernandes for partial summary judgment (Nelson Fernandes, pro se appearing), and the Court having considered the papers filed by the moving parties and those submitted in opposition, having heard oral argument on March **27,** 1995 and for good cause shown, all as set forth on the record, 1995:

IT IS on this 11 th. day of May, 1995:

ORDERED, that the motion of all defendants be and the same are hereby granted; and it further

ORDERED, that the **Amended Complaint be** and **the same is** hereby dismissed with prejudice as to defendants, Rockaway Township Town Council and Township Engineer; Dorsey & Bell, John Dorsey and Joseph Bell; and Rockaway Valley Regional Sewerage Authority and its Executive Director, with no costs; and it is further

ORDERED, that the Amended Complaint be and the same is hereby dismissed without prejudice, as to defendant, United States Environmental Protection Agency and Regional Administrator of Region II; and it is further

ORDERED, that plaintiff's motion for partial summary judgment be and the same is hereby denied; and it is further

ORDERED, that counsel for defendants, Rockaway Township Town Council and Township Engineer, shall serve a copy of this Order upon plaintiff pro se and all counsel appearing within 10 days of it having been entered.

WILLIAM H. WALLS, U.S.D.J.

APPENDIX F

Rockaway Township
John Wojtaszek, Mayor 65 Mount Hope Road
Rockaway, New Jersey 07866-1698
(201) 627-7200

September 10th. 1986

Mr. Nelson Fernandes
26 Watts Avenue
Denville, New Jersey 07834

Re: Block #20504 Lot 9 -- 17 CAYUGA AVE., ROCKAWAY

Dear Mr. Fernandes:

This letter is to confirm 1110 that on July y 21 st., 1986 this office received a check from you in the amount of $ 13,095.73 covering outstanding taxes against the above captioned property.

A breakdown of same is listed below for your perusal:

TAXES 1974/AUG. QT. 1986	=	$8,620.78	
INTEREST	=	4,474.95	13,095.73

Also, on said date, this office received a check from you in the amount of $ 1,762.26 covering outstanding Sewer Assessment charges together with accrued interest.

Please be further advised, as requested, this office has given Certification of Taxes paid to Mrs. P. Tabbot.

Tax Sale Certificate will be sent to you shortly.

Sincerely
FRANCES R. ANTONICH
TAX COLLECTOR

APPENDIX G

§ 54-100 LAND USE AND DEVELOPMENT § 54-100

L. Wetlands. The connection of any structure, to the Rockaway Valley Regional Sewer Authority sewer system, on lands classified as wetlands is prohibited unless a waiver is granted by said Authority. For the purpose of administering this provision wetlands are delineated on a set of municipal tax maps available for inspection at the office of the Township Engineer. Any lands designated as wetlands may be counted as part of a tract acreage for the purpose of computing the maximum density permitted in the zone in which it is located

I HEREBY CERTIFY the above to be a true copy of an Excerpt from the Land Use Ordinance Book which was adopted by the Township Council of the Township of Rockaway at a duly convened Meeting held on December 27, 1984

Almira Salveson, CMC
Township Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NELSON FERNANDES, Plaintiff,	:	Hon. H. Lee Sarokin Civil Action No. 94-338
v.	:	
ROCKAWAY TOWNSHIP TOWN COUNCIL, et al., Defendants.	:	

EPA'S STATEMENT OF FACTS NOT IN DISPUTE

Pursuant to local rule 12 G, EPA submits the following statement of facts that are not in dispute:

1. EPA provided sewer grant funding to RVRSA under Title II of the Clean Water Act, 33 U.S.C. §§ 1281-1299.

2. **Special Condition Number 4 to the Grant Agreement between EPA and RVRSA prohibits new construction located in environmentally sensitive areas (including wetlands) from connecting to the federally funded sewer system, unless this restriction is waived by the Regional Administrator for EPA Region II.**

3. Lot 20504, Block 8 Rockaway Township, is located within an environmentally sensitive wetland area.

4. RVRSA submitted a waiver request for Lot 20504, Block 8 Rockaway Township, received by NJDEP on July 25, 1988.

5. RVRSA's waiver application contained a letter from the U.S. Army Corps of Engineers, dated September 17, 1987, that states in part:

> In the absence of specific information detailing whether the fill activity is located in an isolated

wetland or above the headwaters of the unnamed stream located south of the property, we cannot at this time make a project specific determination concerning the applicability of a nationwide general permit for the fill material discharge proposed.

6. **EPA denied the waiver request for Lot 20504, Block 8 Rockaway Township by letter, dated May 5, 1989**, after "evaluat[ing] all of the information accompanying the request . . ''

7. EPA's administrative record of decision is attached as an exhibit to the Declaration of Robert W. Hargrove.

FAITH S. H0CHBERG
United States Attorney
MICHAEL A. CHAGARES
Assistant U.S. Attorney
970 Broad Street, Room 502
Newark, New Jersey 07102
(201) 645-2700

LOIS J. SCHIFFER
Acting Assistant Attorney
General Environment and
Nat ral Resources Division

MARK A. RIGAU
Trial attorney
U.S. Department of Justice
Environment & Nat. Res. Div.
Environmental Defense Section
Room 7218 - Main Building
10th & Pennsylvania Ave., NW
Washington, D.C. 20530
(202) 514-3376

Attorneys for Defendants, United States Environmental Protection Agency and Regional Administrator of Region II

APPENDIX I

42 U.S.C. § 2000d-2: Any department or agency action taken pursuant to section 2000d-1 of this subtitle shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

N.J.S.A. 40:48-2: "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws **not contrary to the laws of this state or of the United States**, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants , and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." (emphasis added)

40 CFR Ch. I, Subpart F, §35.925-13 (E) "The system would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions (e.g., restricting sewer hook-up) should be used where necessary to protect these resources from new development.."

APPENDIX J

This Appendix lists the exhibits that were presented to the court to show the existence of facts to support a fraud upon the court. Since, a fraud upon the court is an issue of fact for the jury, petitioner will not waste this Court's time with each exhibit. However, he will present these exhibits in the joint appendix if the Court so desires.

The following cross references to the Appellate Court Appendix.

1. Appendix CH, p. 99 - Page from Mr. Bell's brief to Judge Harper.

2. Appendix CI, p.100 - Page from Mr. Bell's brief to Judge Russell.

3. Appendix CJ, p.101 - Page from transcript of hearing before Judge Russell.

4. Appendix CM, p.105 - Certified copy of ordinance passed by town Council before their admitted fraud that shows the Council was fully aware of the grant condition that led to its fraud upon the public. See App.G, p.38.

5. Appendix CE, p.93 - List of lots to be sold in 1990 that shows one of the lots was affected by wetlands.

6. Appendix CF, p.94-96 - List of the same lots to be sold attached to the resolution for sale in 1990. This version was altered to conceal the wetlands in an effort to defraud the public.

7. Appendix CO, p.108 - Copy of township minutes when the engineer admits to a Council policy to deny endorsements.

APPENDIX K

U.S.E.P.A.

DATE: APR 23, 1979

SUBJECT: Limited access interceptor sewers as they relate to the Construction Grant Program in New Jersey
FROM: Robert W. Hargrove, Soil Conservationist
NJ/PR Section, 2-WA-EI
TO: Daniel Sullivan, Chief
EIS Preparation Branch

THRU: Stephen Y. Arella, P.E., Chief
NJ/PR Section, 2-WA-EI

Limiting access to intercepting sewers is a complicated issue because of the broad latitude for varying legal Interpretations. If suitable controls could be implemented, it could be of great help to prevent induced growth in environmentally sensitive areas.

This paper will deal with an overview of the situation. **Court cases and New Jersey's State regulations and statutes will be explored.** EPA options as they pertain to this subject will be explained. These options will be further illustrated by case studies In several EPA regions.

Sewage Disposal as a Public Service

The question of whether or not sewage disposal is a public service is an important consideration in determining the legality of limiting access. One important aspect is the source of funds. **If, as in the past, the funds arise from local taxes, it is likely to be considered a public utility and limiting access would be difficult. However, since passage of the Clean Water Act, most of the design and construction of wastewater treatment facilities are financed by Federal grants. The remainder comes from state grants and bond issues which are recovered through user charges. Theoretically, facilities built using such financial backing could limit sewer hook-ups.**

The issue of sewage disposal as a public service was also addressed in the courts. In Cloyes vs. Delaware Township it was

noted "Sewage disposal is not one of the public services anciently furnished by local governments, nor Is it uniformly so furnished today." This was further substantiated in Pleasure Bay Apartments vs. City of Long Branch, "Neither statutory nor case law impose; a mandatory duty on a municipality to furnish municipal service for disposal of garbage or other wastes:" These cases deal primarily with a municipality not being required to provide such service if none was provided in the first place.

New Jersey State Law

New Jersey's Sewerage Authority law enables counties or municipalities, either alone or in combinations, to establish a sewerage authority. Sewerage authorities are empowered to construct, operate and maintain facilities to collect, treat and dispose of sewage. The law specifies that these authorities have the power, "to enter into any and all contract, execute any and all instruments, and do and perform any and all acts or things necessary, convenient or desirable for the purpose of the sewerage authority or to carry out any power expressly given in this act."

The question of allowing hook-ups rests with both the authority and the municipalities. The authority is free to reasonably fix the terms and conditions of service. The key word in this statement seems to be reasonably. A case from Arizona is a good example of this. In Travaini vs. Maricopa County the county concluded that the county "having installed and maintained a sewer line past the property in question, the city is thereafter required to allow any abutting property owner to use said sewer subject only to reasonable limitations." The "reasonable limitations" in this case being the capacity of the line.

The Arizona case deals with a collection system in a populated area, not an interceptor away from the population, and quite possibly in a sensitive environmental area.

It should be noted that in the case of Southern-Burlington County NAACP vs. Township of Mt. Laurel the courts have concluded that limited access interceptors can not be used as a means of exclusionary zoning.

New Jersey law states that sewerage authorities can be formed. The only stipulation concerning hook-ups is the

abatement of pollution and related health hazards. Another consideration stemming from EPA's cost effectiveness guidelines is that hook-ups may be necessary for a system to be economically feasible.

State law does give to the authority the ability to enter into contracts. These contracts are primarily with municipalities for sewage collection and disposal. It seems to imply that they can also enter into contracts with EPA through grant agreements. These contracts stand on the same footing as contracts between natural persons or municipalities.

New Jersey Septic System Regulations

The Septic System Regulations in New Jersey also affect the issue. The state will not authorize the building of a septic system on a property If a sewer line is within 100 feet of it. With the exception of the general guidelines for sewer hook-ups, the sewerage authority determines sewer use.

EPA Authority

Protection of environmentally sensitive. areas is mandated by Federal policy. Certain actions can be taken to promote this policy with respect to the Construction Grants Program. The first and easiest mechanism is. to limit the capacity of the system to exlude development in environmentally sensitive areas. This is an attempt to limit the number of hook-ups to the system to areas where growth will not impact critical areas.

There will be some small projects that can not be limited with respect to carrying capacity because of minimum sizing of unit processes for treatment. Projects such as these might require grant conditions. The conditions will have to be met in order to insure receipt of a. 201 grant.

The subject of grant conditions was addressed in PRM 75-26 which dealt with mitigating secondary impacts in the Construction Grants Process. The Regional Administrator can withold of Step and 3 grants until effects, or agrees to conditions in the grant document requiring actions to minimize the effects.

Some actions to mitigate these secondary effects include, but are not limited to: phasing and orderly extension of sewer service, project changes improved land use planning, and sewer use

restrictions. It goes on to say that conditions on a grant must be reasonable and the applicant must demonstrate "good faith" and be moving toward mitigative action before the grant is awarded.

Actions that can be taken if the applicant refuses to abide by the grant agreement are: withold payments, refuse to process subsequent grant applications from the municipality, refuse to approve grants for future phases of the projects, enter an injunction against the grant recipient, suspend project work or terminate the grant and recover unexpended EPA funds.

The new regulations (9/27/78) on Municipal Wastewater Treatment Works also contain provisions for conditions on grants. Section 35.935-16 on page 44073 states that "the Regional Administrator shall not pay more than 80% of the Federal-share of any Step 3 project unless he has approved the grantee's sewer use ordinance." This means 15% or more of the total project costs could be held if this is condition wasn't met. However, since this process now entails just a rev w of the ordinance for compliance with the regulations this may be of minimal value to us at this time.

Case Study Evaluation

Case studies from EPA regions show the various techniques that can be used to mitigate adverse impacts in the Construction Grants Program.

In 1975 a project from Region I on Block Island, Rhode Island could have encroached on environmentally sensitive areas. That region first scaled down the project. Then a grant condition was imposed to accept no new hook-ups from wetlands in accordance with the State law.

That same Year a project from Region III in Falling Creek, VA which involved the eutrophication of reservoirs and induced secondary effects on Swift Creek Reservoir. Plant size was reduced and the Step II grant was conditioned on the development of a Swift Creek Watershed Management Plan.

In 1975 a Region VIII project in Renner, SD was leading to new development on a floodplain. A grant condition, based on the county floodplain ordinance, that said no new hook-ups from the 100 year floodplain. The Region also recommended that capacity be limited to existing population plus a moderate increase.

In 1974 a Region IX project in Fairfield, CA included pressure to increase industrial and low density residential land on or near Suisun Marsh and pressure to develope agricultural land with impacts on air quality and wildlife. The Step 3 grant was conditioned to not provide service to new development immediately adjacent to the marsh based on pending State protection legislation..

In 1976 a Region X project in North Fremont, SD was leading to pressures to increase development in environmentally sensitive areas. These areas included fishing and wildlife management areas. The project was altered to have four small sub area facilities instead of one large Regional plant with long interceptors. The Step 2 and 3 grants were conditional on County compliance with State law requiring development of growth controls and a comprehensive land use plan.

Summary

Case studies show that EPA can and does use grant conditions and project changes to limit development due to funded projects. **It should be said that if it is possible to base the grant condition on a state or local law then do it. This will take a lot of heat for such an action away from falling directly on EPA.** Those laws could include floodplain ordinances (Block Is., RI) or complying with State requirements for land controls (North Fremont,' SD). **Such conditions could be based on Federal law but this tends to foster the public opinion that the Federal government is just trying to control 'local zoning.** State or local laws that apply to such situations should be added in to direct the public rage away from EPA, when possible.

Limited access interceptors is a question that has never formally been answered in the courts. to do so might require upwards of 3-4 years to make it through all appeals. The 'question is not entirely addressed in New Jersey State law either. The policy of protecting sensitive environmental areas can be fostered by changing the plan or imposing grant conditions. EPA has done this in the past and an analysis of these cases show how such problems can be handled in the future.

Recommended Regional Policy Options

1) Grant Conditions with 3rd party enforcement after grant expiration.
2) 208 plan inclusion of model local sewer use ordinance and adoption by local municipalities.
3) Approval of Sewer Use Ordinances by EPA.
4) Constraining service. agreements between MUA's and member municipalities.

APPENDIX L

U.S.E.P.A.

DATE: May 2 5 1979

SUBJECT: Grant and Permit Conditions to Restrict Sewer Hookups in Environmentally Critical Areas
FROM: Daniel Sullivan, Chief
EIS Preparation Branch
TO: Conrad Simon, Director
Water Division

Scope of the Problem

EPA's funding of wastewater treatment works through the Construction Grants Program has been criticized for not adequately discouraging growth in environmentally sensitive lands (i.e. floodplains, wetlands, and significant wildlife habitats). In the past, the Agency's policy has been to eliminate any capacity in proposed systems that would serve these sensitive lands. However, in several cases this mitigating measure has proven to be inadequate to curb unsound growth.

ISSUE

Should EPA-Region II begin to affix special conditions to Step 2 and 3 construction grants, 208 areawide plans, and 402 permits to prohibit development in environmentally critical areas?

Salient Factors

The September 27, 1978 Construction Grants Program Rules and Regulations specifically encourages the use of grant conditions restricting sewer hookups to protect environmentally sensitive land from new development. However, because of some of the legal complexities associated with such grant conditions, Region II has never exercised this control. We now have several ideal examples where such conditions are both appropriate and easily justified.

Unfortunately, merely limiting the size of wastewater treatment facilities does not adequately protect sensitive areas. An excellent example of how a reduction in facilities capacity has a very limited influence on where housing and sewer hookups can occur is the proposed Cape May Region project. The EPA had reduced

the size of the proposed facilities to specifically exclude wetlands, flood hazard areas, and significant wildlife habitat areas from development. Yet, an application for a 250 unit residential development (in the flood hazard area, - see attached Map 1) is currently before the New Jersey Department of Environmental Protection. Discussions with DEP personnel reveal that the developer intends to rely on the proposed regional sewer system to satisfy the wastewater treatment need of the proposed housing project.

Major Actors

1. USEPA-Region II (RA, WDD, RC)
2. U.S. Fish and Wildlife Service
3. New Jersey Department of Environmental Protection
4. Local Municipalities
5. 208 Agencies
6. Natural Resources Defense Council
7. American Littoral Society
8. National Wildlife Federation

Political Considerations

Grant conditions of this type have been used in other regions but have relied heavily upon State Law for their enforcement (see Attachment 1). New Jersey State Law does not adequately protect environmentally sensitive areas primarily because federal regulations encompass more types of sensitive areas. However, there are strong statements in the New Jersey Water Pollution Control Act (NJWPCA) Regulations which mandate conformance of future 201 grants with applicable 201, 208 and 3103 plans.

EPA has a clear mandate in law, regulation, executive orders and EPA Policy (see Attachment 2) to protect the following critical areas:

1. Significant Habitats of Wildlife, including Rare and Endangered Species Habitats Endangered Species Act and Fish and Wildlife Coordination Act
2. Floodplains - Executive Order 11988
3. Wetlands - Executive Order 11990

We also have some rather strict policies on protection of prime agricultural - lands (EPA Policy Statement - September 26, 1978)

and less strict policies on other sensitive areas, such as steep slope areas and unique vegetational communities

There are a number of influential national interest groups that have been actively prodding EPA to apply such conditions. Among these are:

1. Natural Resources Defense Council
2. American Littoral Society
3. National Wildlife Federation

In addition, the U.S. Fish and Wildlife Service has also expressed their opinion that grant conditions of this type should be used unique ecological nature of the Cape May Region to protect the unique ecological nature of the Cape May Region.

Background

EPA-Region II has been reticent in applying such conditions in the past for several reasons. Most New Jersey facility planning grants are given to Municipal Utility Authorities (MUAs)-established through State Law. Some questions have been raised as to whether or not an MUA can accept a condition which affects land use controls and, if they can, whether the condition Is enforceable against its member municipalities. The NJSA 40:14A-23 (see Attach. 3) appears to permit the MUA to accept such conditions. Another frequent objection to the use of the grant conditions has been that the duration of the enforcement of a grant condition expires at the end of the grant period. However, since many of our grants are phased the applicability may well be extended for a considerably longer period than the initial grant.

Admittedly, limiting access to interceptors or collection systems via grant conditions themselves will not guarantee better land use planning. However, it is an essential element of a multi-pronged approach to resolving this problem.

The NPDES Proposed Revision of Existing Regulation published in the August 21, 1978 Federal Register requires discharge permits to be consistent with the reflective of the Clean Water Act and any appropriate Federal Executive Orders. It also states

that permits should include more stringent requirements where necessary to insure consistency with areawide waste treatment management (208) plans (AWTMP). Many existing permits are expiring in the near future and, prior to reissuance, considerable effort is anticipated to assure consistency with both 201 facilities plans and 208-funded AWTMP's.

Recommendations

Based on the May 24 briefing on the Cape May regional project, the following represents my understanding of the direction set by Eckardt C. Beck. The activities proposed can and should be initiated concurrently and are not necessarily contingent upon the success of the other parts for their effectiveness.

First, where the review of 201 facility plans (including ESAs) identifies environmentally sensitive ares requiring protection, grant conditions should be affixed specifically constraining sewer hookups. We anticipate that detailed maps of the facility 1 typlanning area will be used to identify sensitive areas and existing discharges (i.e. homes and subdivisions) There are two New Jersey 2Ols in-house that are excellent examples of the need for such conditions: Jakes's Branch Interceptor and Stafford Township Collection System.

The proposed Cape May Region Wastewater Treatment Facilities Plan requires a slightly different approach. A negative declaration was issued on January 25, 1979. The use of a special condition restricting sewer hookups represents a substantial change from the statements made in the negative declaration. Once the facility plan is revised to show which specific lots will be served by the proposed facility, we will issue an addendum to the negative declaration specifically detailing our intent to use grant conditions. The addendum will allow for a 30 calendar day comment period.

Second, the 2O8-funded areawide waste treatment management plans (AWTMP) for these areas should be required to reflect the need to protect these sensitive areas. In order to accomplish this in the Cape May Region, the 208 agency should adopt the revised 201 plan as part of the AWTMP. No Step 3 grant will be awarded to the CMCMUA until this portion of the AWTMP is

approved by EPA. We intend to send a letter to the Cape May 208 agency informing them of this requirement.

Third, the Permits Branch, in coordination with Regional Council, should develop permit conditions to reflect sewer hookup restriction which are detailed in the special grant condition for the Step 2 201 grants. Permits Branch should also develop a strategy for identifying future permit violations, e.g., if a connection occurs from an area defined to be environmentally sensitive.

Pros and Cons

Pros: Use of grant conditions and subsequent enforcement will clearly demonstrate EPA's intent to protect: environmentally sensitive areas. **Even if we had to rely on third party enforcement of the conditions, it would provide a firm legal basis for future adjudication.**

It is responsive to valid concerns presented by NRDC, ALS, NWF, and USFWS. Failure to respond to their inquires is likely to result in litigation con at least on in-house project (Cape May Region).

Once established, the use of grant conditions will streamline the 201 grants process. Projects are frequently delayed because of concerns that sensitive areas have not been adequately protected (e.g. Cape May Region).

Projects which may prove more cost effective on a regional rather than subregional basis may no longer be channeled away from single plant schemes solely to protect environmentally sensitive areas.

Cons: Grant conditions of this type have never been used in Region II before and there is a potential for litigation concerning the legality of federal intervention in local land use planning.

These conditions may not be enforceable by EPA beyond the life of the current grant. However, in many cases, we anticipate future grants to the affected MUAs. Furthermore, a grant

condition may be enforceable after the grant expires because it is a contract between EPA and the authority.

State acceptance of these conditions is complicated by the fact that they define sensitive areas differently than EPA defines them. Application of this process to other 201s, 208s and permits in the region is a manpower intensive effort.

Strategy and Timetable.

1. Affix grant conditions to the two pending New Jersey 201 grants mentioned earlier, immediately.

2. Require the CMCMUA to revise the Cape May Region facility plan.

3. Issue an addendum to the Cape May Region Negative Declaration.

4. Require the 208 agency to work with the CMCMUA to assure adoption of the revised 201 plan prior to October 1, 1979.

5. Negotiate with the State to require them to amend its regulations to redefine environmentally sensitive areas to agree with the federal definitions through the State/EPA Agreement process.

6. Negotiate with the State to require them to amend its review procedure to reject grant applications and deny sewer extension permits which would serve sensitive areas through the 205(g) Delegation Agreement.

7. Require all 208 grantees to give high priority to the identification of environmentally sensitive areas where large-scale development is projected.

Additional Attachments

1. Basis in Regulation, Executive Order and EPA Policy Supporting the Use of Grant Conditions to Protect Environmentally Critical Areas.

2. April 23, 1979 memo from R. Hargrove to D. Sullivan discussing potential use of grant conditions to limit access to interceptors.

3. Article excerpted from New Jersey Effluents (April 1979) entitled "Limited Access Interceptors?"

cc: Peter Devine
William Muszynsk
Helen Fenske
Pat Harvey
Charles Durfor
Dave Luoma
Richard Salkie
Mike Ronchonsky
Kevin Bricke
Steve Arella

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Nelson Fernandes,

Hon. H. Lee Sarokin

Plaintiff,

Civil Action No. 94-338

V.

Rockaway Township Town Council
et al.

Defendants

I, Robert Hargrove, hereby declare and certify as follows:

DECLARATION OF ROBERT W. HARGROVE

1. My name is Robert Harqrove. I have personal knowledge of the facts contained in this declaration.

2. Presently, I serve as Chief of the Environmental Impacts Branch of the Office of Policy and Management of the Region II office of the United States Environmental protection Agency (EPA). As part of my duties with the EPA, I am responsible for maintaining the records pertaining to the federal sewer grant program for Region II.

3. In my capacity as records custodian, I had occasion to review the official records pewtaining to a waiver request from NJDEP, dated Febuary 9, 1989, for block 20504, lot 8 in Rockaway Township, owned by Mr. Nelson Fernandes. An indexed copy of the records of the waiver request request are attached hereto as exhibits A - X.

4. In the course of my work with the EPA, I have been extensively involved in EPA's National Environmental Policy Act (NEPA) program. As a part of this program, EPA is responsible for the analysis of potential impacts, including cumulative impacts, of major federal actions implemented by EPA. One such action was the awarding of a federal grant to the Rockaway Valley Regional Sewerage Authority (RVRSA) in 1983 for the construction of wastewater treatment facilities. A major or concern in awarding this grant was the need to mitigate indirect impacts such as induced development of environmentally sensitive areas (ESA), particularly wetlands (Exhibits A, B, and C). **Protection of these areas is mandated by federal statutes, regulations, and policies. In order to meet federal policy mandates, a special condition was placed on the grant reguiring the grantee to agree that for a period of 50 years no sewer hook-ups to the federally funded facilities would be allowed without a waiver of the condition from the Regional Administrator (Exhibit E).** As Chief of the Environmental Impacts Branch, it is my responsibility to develop recommendations for consideration by the Regional Administrator on the disposition of these waiver requests. These recommendations are based on an evaluation of the merits of each case with regard to specific criteria (see Exhibit D). Of Primary jmportance in EPA's decision are the recommendation of the New Jersey Department of Environmental Protection (NJDEP) and the ecological value of the ESA in question.

5. EPA received a waiver request package from the NJDEP dated February 9, 1989 for Block 20504, Lot 8,in Rockaway

Township, property owned by Mr. Nelson Fernandes. The RVRSA had initiated the waiver request by submitting a letter (Exhibit J) that contained the following items: Letter from Homeowner, Rockaway Township Resolution, Sewer Allocation, ACOE Jurisdictional Determination, and a Wetland Delineation Report. The NJDEP of the waiver request (Exhibit L) .

6. A second site inspection was performed at the Fernandes property on March 15, 1989 by NJDEP at the request of EPA, and the NJDEP' s recommendation ion to deny the waiver request was reconfirmed (Exhibits N and 0) .

7. EPA reviewed all the information contained in the initial package and the results of the second site visit, and on May 5, 1989, denied the RVRSA waiver request for the Fernandes property based on the extent and ecological value of the wetlands (Exhibit P).

8. On May 30, 1989, EPA met with Mr. Fernandes and the NJDEP to discuss. the waiver denial (Exhibit Q). At the meeting, EPA agreed to perform its own site visit for the purpose of potentially re-evaluating our decision to deny the waiver.

9. On May 31, 1989, Mr. Fernandes informed EPA that, upon the recommendation of his lawyer, he could not allow EPA to inspect his property unless we agreed to sign a statement that we would not use any infsrmation gathered at the site visit against him if a claim was filed Mr. Fernandes was informed that EPA could not aqree to this blanket condition, and that, therefore, the waiver would stand (Exhibits R and S) .

10. EPA is willing to re-evaluate Mr. Fernandes request if provided with sufficient information to determine the impact of the proposed fill activities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 3, 1994

Robert W. Hargrove 8/3/94

No. 95-2076

Supreme Court, U.S.
FILED
JUL 29 1996

In The

Supreme Court of the United States

October Term, 1995

NELSON FERNANDES,

Petitioner,

vs.

ROCKAWAY TOWNSHIP TOWN COUNCIL, TOWNSHIP ENGINEER, R.V.R.S.A. & EXECUTIVE DIRECTOR, E.P.A. & REGIONAL ADMINISTRATOR OF REGION II, DORSEY AND BELL, JOHN DORSEY and JOSEPH BELL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES J. HIGGINS
BOYAR, HIGGINS & SUOZZO, P.A.
Of Counsel and on the Brief
10 Park Place
Suite 415
Morristown, NJ 07960
(201) 538-8008

DOUGLAS R. CABANA
Counsel of Record
104 Elcock Avenue
Boonton, NJ 07005
(201) 335-7100

Attorneys for Respondents Rockaway Township Town Council, Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell

9263
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	2
I. The courts below properly concluded that all of petitioner's claims were barred by either claim preclusion [*res judicata*] or issue preclusion [collateral estoppel]	5
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Board of Trustees v. Centra, 983 F.2d 495 (3d Cir. 1992)	10, 11
Fernandes v. Rockaway Township Town Council and Township Engineer, 510 U.S. 863, 114 S. Ct. 181, 126 L. Ed. 2d 140 (1993)	1, 7
Fernandes v. Rockaway Township Town Council, et al., 133 N.J. 437 (1993)	7
Rodziewicz v. Beyer, 809 F. Supp. 1164 (D.N.J. 1992)	10
Untracht v. West Jersey Health System, 803 F. Supp. 978 (D.N.J. 1992)	9, 10
Velasquez v. Franz, 123 N.J. 498 (1991)	9, 11
Wheeler v. Nieves, 762 F. Supp. 617 (D.N.J. 1991)	10

Contents

Page

APPENDIX

Appendix A — Partial Transcript of United States District Court Judge William H. Walls Dated March 27, 1995 Granting Respondents' Motion for Summary Judgment 1a

Appendix B — Order Dismissing Petitioner's Amended Complaint Filed May 11, 1995 ..... 8a

Appendix C — New Jersey Superior Court Appellate Division Opinion Affirming Judgment Below Dismissing Petitioner's Earlier State Court Case [Docket No. A-4311-91] Filed January 22, 1993 .... 11a

STATEMENT OF THE CASE

Respondents, Rockaway Township Town Council, Township Engineer, Dorsey & Bell, John Dorsey and Joseph Bell, submit this brief in opposition to the Petition for a Writ of Certiorari filed by Nelson Fernandes. As to the Rockaway Township respondents and their attorneys, this Court has once before reviewed the issues raised by petitioner and found them to be wanting. In 1993, following litigation in both the federal and state courts, Mr. Fernandes filed a Petition for Writ of Certiorari in an action captioned *Fernandes v. Rockaway Township Town Council, et al.*, a petition which this Court denied.[1]

Despite his first unsuccessful round of federal and state litigation, petitioner commenced a second federal action alleging the same facts, however, certain new parties were added as defendants. Among those new defendants were Rockaway Township's attorneys, Joseph Bell, John Dorsey and the law firm of Dorsey & Bell.

Relying on *res judicata* and collateral estoppel, the Rockaway Township respondents and their attorneys moved for summary judgment before the Honorable William H. Walls, U.S.D.J. on March 27, 1995. Judge Walls granted the respondents' motion for summary judgment rendering an opinion from the bench [Appendix A hereto] and the Order dismissing the petitioner's amended complaint was entered on May 11, 1995 [Appendix B hereto]. Petitioner's appeal to the United States Court of Appeals for the Third Circuit followed, and, on March 26, 1996, the Third Circuit affirmed Judge Walls' Order. This petition for a writ of certiorari followed.

---

1. *Fernandes v. Rockaway Township Town Council and Township Engineer,* 510 U.S. 863, 114 S. Ct. 181, 126 L. Ed. 2d 140 (1993).

REASONS FOR DENYING THE WRIT

All of the issues raised by petitioner with respect to the Rockaway Township respondents and their attorneys have been heard before, and the courts below properly concluded that all of petitioner's claims were barred by either *res judicata* (claim preclusion) or collateral estoppel (issue preclusion).

As to the Rockaway Township respondents and their attorneys, petitioner raises two points:

> (1) that Rockaway's Ordinance §54-100 L violates equal protection, case law and a state statute (Petition at 21); and
>
> (2) that Joseph Bell, Township Attorney for the Township of Rockaway, and the Township of Rockaway and its municipal engineer, committed a fraud upon a state court in a prior proceeding and that the fraud of the attorney and the township engineer supported an inference that they were concealing a town council policy of fraud and civil rights violations (Petition at 25-8).

Both of these issues were raised before.

In his earlier Petition for Writ of Certiorari, (No. 93-88), Mr. Fernandes attacked Rockaway Township's Ordinance § 54-100 L, albeit couched in slightly different terms. In *Argument 3* to his earlier Petition in No. 93-88 entitled, "*ROCKAWAY TOWNSHIP VIOLATED ITS GRANT OF POLICE POWER AND POWER TO CONTRACT*", Mr. Fernandes wrote:

> Rockaway Township passed § 54-100 L,

a land use ordinance which prohibits connection of wetland lots to the sewer treatment plant. It did so in support of a contractual condition which contravenes a federal statute. Rockaway's legislative act was required by the following holding:

*"A municipality cannot act as an individual does: it must proceed in conformity with statute or, **in the absence of statute, with the common law, by ordinance**, or resolution or by motion: this is especially true with respect to real estate." Skowysz v. City of Ventnor*, 110 N.J. Super. 340, 265 A.2d 554 (1970).

However, the passage of this ordinance, as well as their approval of the grant condition as a member of the RVRSA, not to mention the RVRSA's acceptance of the grant condition, was beyond their power to contract and their police powers based on the following holdings:

"The grant of police power 'relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability.' " Wagner v. Mayor and Municipal Council of City of Newark, 24 N.J. 467, 478 (1957).

"Hence the municipality may not legislate upon an aspect of a subject 'inherently in

> *need of uniform treatment.' " In re Public Service Electric and Gas Co.*, 35 N.J. 358, 371 (1961) [Emphasis original].

In addition, petitioner raised the same argument with respect to fraud upon a court. In *Argument 9* to his earlier Petition in No. 93-88 entitled "*TOWNSHIP ATTORNEY ACTED AS AN ADVOCATE-WITNESS AND RISKED A FRAUD UPON THE COURT,*" Mr. Fernandes wrote:

> Mr. Bell created the impression that the Council was unaware of the grant condition until he brought this fact to their attention. He then states the contrary in a brief to Judge Russell:
>
> *"Mr. Fernandes admits, by his own affidavit, that he knew of the EPA Grant Condition (**and the Township's concealment of same and decision to sell despite it**)."*
>
> By admitting that the council deliberately concealed the Grant Condition, he admits his misstatement and the town's concealment. Had the court not dismissed these issues, he and the engineer would have testified to a fact that he subsequently recants. Mr. Bell's actions meet the following finding, which resulted in a new trial:
>
> *"even if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact, an obligation not to hide the real facts behind a facade." U.S. Ex*

Rel. Triano v. Superior Ct. of N.J., 393 F. Supp. 1061 (1975).

Mr. Bell admits the truth to Judge Russell in order to make it appear the petitioner's case is beyond the statute of limitations for the federal claims. However, Judge Russell didn't accept this contention, based on the following finding:

"But he didn't know, he thought it came on after he got the property."

Mr. Bell's retort confirms the Council's presale knowledge, *"That doesn't mean we didn't."* [Emphasis original].

Thus, the issues raised in petitioner's second Petition for a Writ of Certiorari are virtually identical to those raised in petitioner's prior Petition for Writ of Certiorari which was denied on October 4, 1993. There is no reason for this Court to grant petitioner's second Petition.

I.

THE COURTS BELOW PROPERLY CONCLUDED THAT ALL OF PETITIONER'S CLAIMS WERE BARRED BY EITHER CLAIM PRECLUSION [*RES JUDICATA*] OR ISSUE PRECLUSION [COLLATERAL ESTOPPEL].

In his most recent federal action, petitioner raised the same claims arising from the same nucleus of operative facts which were unsuccessful in his first round of litigation against Rockaway Township respondents. As found below, petitioner's second federal action adds additional parties as defendants but

asserts no new claims against the Rockaway Township respondents or their attorneys. A partial record of prior proceedings between petitioner and the Rockaway Township respondents and their attorneys reveals that:

- Petitioner's first Complaint was dismissed on November 28, 1990 without prejudice by United States Federal District Court Judge Maryann Trump Barry sitting in the United States District Court for the District of New Jersey for failure to adequately state a claim for violation of any federal constitutional rights [Civ. Action No. 90-830 (MTB)];

- Petitioner's motion to file an amended complaint in the federal court was denied on September 21, 1991, at a time when Judge Barry was aware that Judge Harper in the Superior Court of New Jersey had dismissed all but two of the counts of plaintiff's state court complaint [Civ. Action No. 90-830 (MTB)];

- Petitioner's state court action was dismissed on the merits by New Jersey Superior Court Law Division Judge John J. Harper on July 10, 1991, and by Judge Karen Russell on January 2, 1992 [Docket No. MRS-L-5845-90];

- Petitioner's appeal of the Law Division dismissal was affirmed after appellate review by the New Jersey Superior Court Appellate Division [Docket No. A-4311-91; Appendix C hereto];

- Petitioner's petition for certification was denied by the New Jersey Supreme Court on March 15, 1993[2], as was petitioner's motion for reconsideration on May 11, 1993; and

- Finally, petitioner's petition for writ of certiorari was denied by the United States Supreme Court on October 4, 1993.[3]

Petitioner's most recent Federal Court Complaint, coming directly on the heels of the denial of his Petition for Certiorari by this Court, could only have been motivated by his continued personal annoyance at the Rockaway Township respondents and their attorneys. All of Mr. Fernandes' complaints against the Rockaway Township respondents and their attorneys had been aired before, and petitioner's misguided attempt to obtain a "second bite of the apple" was appropriately dismissed.

As the procedural history reveals, petitioner's claims against the Rockaway Township respondents and their attorneys have been presented and reviewed by the trial benches of both the federal and state courts and properly tested through appellate review all the way to the highest court of the United States in petitioner's first round of litigation.

In the second round of litigation, Judge Walls, sitting in the United States District Court for the District of New Jersey, after a comprehensive review of the record, concluded:

> As I said originally to him, I repeat to all

---

2. *Fernandes v. Rockaway Township Town Council, et al.*, 133 N.J. 437 (1993).

3. 510 U.S. 863, 114 S. Ct. 181, 126 L. Ed. 2d 140 (1993).

parties, with regard to the claims brought against Rockaway Township, the Town Council and Township Engineer, all of those, in my opinion, have been the subject of res judicata. His claims against Rockaway Township, the Town Council and the Township Engineer have been adequately and fully, in my opinion, presented and tested before trial judges and through the process of appellate review.

These matters, as I said, were denied. The merits of them were found to be wanting by two Superior Court judges and later by the Appellate Division, which action was reviewed by our highest tribunal. Because these claims have already been adjudicated, they are therefore barred. All of the elements of res judicata are satisfied, and his claims against these parties are dismissed.

Plaintiff's claims brought against defendants Dorsey & Bell Law Office, John Dorsey and Joseph Bell, are dismissed by the doctrine of collateral estoppel. The thrust of that type of determination is that identical issues have been decided on prior adjudication. There has been a final judgment on the merits.

* * *

Furthermore, plaintiff contends defendant Joseph Bell admitted alleged concealment before the Superior Court. The

> issue of whether Rockaway Township concealed the grant petition[4] has already been adjudicated.
>
> The claim asserting knowledge of Rockaway Township's concealment made against the attorneys in the law office must per force fail if a court already determined that Rockaway Township did not conceal the grant condition, or that the burden of proof with regard to this assertion has not been met.
>
> Therefore, these matters having already been adjudicated adversely against him, they have to be dismissed, as I do now dismiss them, against the individual attorneys.

[Transcript of District Court Opinion, Appendix A hereto].

In both the federal and state courts, the doctrine of claim preclusion, also known as *res judicata*, prevents a party or its privies from having to relitigate a cause of action that has been finally determined on the merits. *See, e.g., Untracht v. West Jersey Health System*, 803 F. Supp. 978, 981 (D.N.J. 1992); *Velasquez v. Franz*, 123 N.J. 498, 505 (1991). Under federal claim preclusion law,

> Three basic elements are required before a court can invoke claim preclusion: (1) the judgment in the first action must be valid, final and on the merits; (2) the parties in the later action must be the same as, or in privity with, those in the first action; and (3) the

---

4. Should be "condition."

> claim(s) in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.
>
> * * *
>
> Not only does claim preclusion apply to claims actually litigated, but the New Jersey Supreme Court has explained that the doctrine applies to all claims that should have been brought in the earlier action.

Untracht, supra at 982. *See also, Board of Trustees v. Centra*, 983 F.2d 495, 504 (3d Cir. 1992); *Rodziewicz v. Beyer*, 809 F. Supp. 1164, 1166-70 (D.N.J. 1992); *Wheeler v. Nieves*, 762 F. Supp. 617, 623-24 (D.N.J. 1991).

Similarly, with respect to any state law claims, the principles of *res judicata* have now been well established by the New Jersey Supreme Court:

> The term "*res judicata*" refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated. . . In essence, the doctrine of *res judicata* provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding.
>
> * * *
>
> The rationale underlying *res judicata* recognizes that fairness to the defendant and

> sound judicial administration require a definite end to litigation. . . The doctrine evolved in response to the specific policy concerns of providing finality and repose for the litigating parties; avoiding the burdens of relitigation for the parties and the court, *ibid.*; and maintaining judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter.

Velasquez v. Franz, *supra* at 505.

Similarly, with respect to the party defendants added to the second round of litigation:

> Issue preclusion, formerly titled collateral estoppel, proscribes relitigation when the identical issue already has been fully litigated. Issue preclusion may be invoked when: (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question.

Board of Trustees, *supra* at 505.

There is simply no reason to allow this petitioner to relitigate the claims previously dismissed against the Rockaway Township respondents and their attorneys, whether those claims are asserted under state law in contract or in tort, for deprivation of federal civil rights, for federal constitutional violations or on

a conspiracy theory. All of petitioner's claims have been litigated at least once, they have all been dismissed, they have all been thoroughly reviewed by at least one appellate court and further applications for review have been denied by the highest state court and the highest federal bench. It is merely petitioner's personal pique that causes him to pursue these claims again. Under such circumstances, the interests of justice and fairness require that petitioner's request for further review by this Court be denied and that the matters decided below remain settled.

CONCLUSION

For the reasons set forth, and based upon the authorities cited hereinabove, it is respectfully requested that this Court deny petitioner's writ of certiorari.

Respectfully submitted,

DOUGLAS R. CABANA
Counsel of Record
104 Elcock Avenue
Boonton, New Jersey 07005
(201) 335-7100

JAMES J. HIGGINS
BOYAR, HIGGINS & SUOZZO, P.A.
Of Counsel and On the Brief
10 Park Place
Suite 415
Morristown, New Jersey 07960
(201) 538-8008

Attorneys for Respondents
Rockaway Township, Town Council,
Township Engineer, Dorsey and Bell,
John Dorsey and Joseph Bell

APPENDIX A — PARTIAL TRANSCRIPT OF UNITED STATES DISTRICT COURT JUDGE WILLIAM H. WALLS DATED MARCH 27, 1995 GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 94-0338 (WHW)

FERNANDEZ,

Plaintiff,

-vs-

ROCKAWAY TOWNSHIP, ET AL,

Defendants.

TRANSCRIPT OF PROCEEDINGS
(EXCERPT)

March 27, 1995

BEFORE:

THE HONORABLE WILLIAM H. WALLS
UNITED STATES DISTRICT JUDGE

Appendix A

APPEARANCES:

NELSON FERNANDEZ, PRO SE.

BOYAR, HIGGINS & SUOZZO, P.A.
BY: JAMES J. HIGGINS, ESQ.,

-and-

MC MANIMON & SCOTLAND, ESQS.,
BY: JOSEPH J. MARAZITI, JR., ESQ.,

-and-

DOUGLAS R. CABANA, ESQ.,
Attorneys for Defendants.

[2] * * *

THE COURT: In August of 1985 Rockaway Township held a public sale of real property. That was done by auction. Property was sold "as is." No representations of any kind were made by the Township of Rockaway as to the condition, area or boundaries of the property sold.

Lot 8 was one of the land parcels which was available for bidding by the public. A portion of that lot was covered by the environmental sensitive fresh water wetlands.

The present plaintiff, Mr. Fernandez, won by bidding $10,000 for Lot 8, and he had a title search done at time of purchase and took title by deed recorded with the Morris County Clerk.

Appendix A

He later purchased Lot 9 adjacent to Lot 8, and according to his representations, planned to divide the two lots and build a single-family dwelling. He hoped to connect it to the sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government.

In 1983 the federal government had given or gave Rockaway Township a grant in order that the Township could build a sanitary sewer system.

According to that grant agreement, lots within that [3] environmental sensitive area could not be connected to federally funded sewers. The purpose of the condition was to protect the surrounding wetlands.

Unfortunately, plaintiff's lots are two of approximately 140 lots in the Township which were impacted by that grant condition.

Mr. Fernandez attempted to obtain a waiver from that ban of the EPA, but in 1989 Rockaway Valley Regional Sewerage Authority received a letter from the EPA's Acting Regional Administrator denying the request.

Consequently, Mr. Fernandez sought the aid of Federal Court, U.S. District Court for this district, and brought a complaint against Rockaway Township Town Council and the Township Engineer, and that complaint or a later amended complaint alleged ten causes of action, including alleged material misrepresentation, violation of statute and fraudulent concealment.

Appendix A

That was dismissed by Judge Barry of this Court on November 28, 1990 determining that it might be better for plaintiff to commence his action before the State Court, which he did.

Apparently in 1991, and again in 1992, his State Court actions were dismissed by the Superior Court of New Jersey.

He had in the amended complaint before the State [4] Court alleged:

(1) That the sale of property to him by Rockaway Township was in violation of state statute 40:A12-13.

(2) That there was a malicious policy and custom of Rockaway Township Town Council to sell worthless lots in violation of 42 USC section 1983.

(3) That the Township Engineer had conspired with the Town Council in carrying out this policy with regard to the sale of lots.

(4) That the Township Council members conspired among themselves to effect the sale of lots which represented a malicious abuse of governmental power.

(5) That there was, in addition, conspiracy to have the Township conceal the EPA grant condition.

(6) That the Township arbitrarily denied requests from owners of wetland lots to conceal the original conspiracy.

Appendix A

(7) That the Rockaway Township Engineer harassed plaintiff in violation of his constitutional rights.

(8) That such rights were infringed by the Township Engineer, which represented discrimination upon plaintiff who was a member of a minority.

(9) That there was fraud committed upon him and the public when the Rockaway Township made an "as is" sale, making it appear to conform to statutes.

[5] And lastly, that the Township sale of the lots contrary to the statute represents a taking and implied promise to pay compensation.

As I said before, this complaint was dismissed in two parts really by two Superior Court Judges, and thereafter exercising the right of automatic appeal to the Appellate Division. Again, Mr. Fernandez lost. The Appellate Division asserting in dismissing the matter, "We see no basis for breach of contract claims advanced by plaintiff to the extent he relies upon tort claims because of the personal injury aspect of the federal claims." He was barred by the statute of limitations, and also, that the claims pursuant to 42 USC section 1983 were barred by the New Jersey's two-year statute of limitations.

Thereupon, Mr. Fernandez sought relief from the New Jersey Supreme Court, which denied certification in March of 1993. He petitioned the Court for reconsideration which again was denied in May in 1993.

Thereafter he sought writ of certiorari from our United States Supreme Court, which was denied in October of 1993.

Appendix A

I think I fairly represented the procedural history, and now he commences this present action before this Court, having done so in January of last year, January 24, 1994.

[6] As I said originally to him, I repeat to all parties, with regard to the claims brought against Rockaway Township, the Town Council and Township Engineer, all of those, in my opinion, have been the subject of res judicata. His claims against Rockaway Township, the Town Council and the Township Engineer have been adequately and fully, in my opinion, presented and tested before trial judges and through the process of appellate review.

These matters, as I said, were denied. The merits of them were found to be wanting by two Superior Court judges and later by the Appellate Division, which action was reviewed by our highest tribunal. Because these claims have already been adjudicated, they are therefore barred. All of the elements of res judicata are satisfied, and his claims against these parties are dismissed.

Plaintiff's claims brought against defendants Dorsey & Bell Law Office, John Dorsey and Joseph Bell, are dismissed by the doctrine of collateral estoppel. The thrust of that type of determination is that identical issues have been decided on prior adjudication. There has been a final judgment on the merits.

The party against whom the bar has been asserted either was a party or in privity with a party of the former adjudication, and the party against whom the bar is associated had a full and fair opportunity to litigate the [7] issues in question.

Defendants John Dorsey and Joseph Bell of the Dorsey &

Appendix A

Bell law firm represented Rockaway Township in the first action. Plaintiff alleged in discovery, that said defendants were aware of the Rockaway Township's policy to sell wetland lots.

Furthermore, plaintiff contends defendant Joseph Bell admitted alleged concealment before the Superior Court. The issue of whether Rockaway Township concealed the grant petition has already been adjudicated.

The claim asserting knowledge of Rockaway Township's concealment made against the attorneys in the law office must per force fail if a court already determined that Rockaway Township did not conceal the grant condition, or that the burden of proof with regard to this assertion has not been met.

Therefore, these matters having already been adjudicated adversely against him, they have to be dismissed, as I do now dismiss them, against the individual attorneys.

* * *

APPENDIX B — ORDER DISMISSING PETITIONER'S AMENDED COMPLAINT FILED MAY 11, 1995

BOYAR, HIGGINS & SUOZZO, P.A. (JH 8207)
A Professional Corporation
10 Park Place, Suite 415
Morristown, New Jersey 07960
(201) 538-8008
Attorneys for Defendants, Rockaway Township Town Council and Township Engineer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 94-338 (WHW)

NELSON FERNANDES,

Plaintiff,

v.

ROCKAWAY TOWNSHIP TOWN COUNCIL AND TOWNSHIP ENGINEER, *et al.*,

Defendants.

ORDER DISMISSING AMENDED COMPLAINT AS TO ALL DEFENDANTS

THIS MATTER having been opened to the Court on March 27, 1995, Honorable William H. Walls, U.S.D.J. presiding, upon defendants' motions brought pursuant to Fed.R.Civ.P. 12(b)(1), Fed.R.Civ.P.12(b)(6) and Fed.R.Civ.P.56 to dismiss the Amended Complaint, by defendants, Rockaway Township Town

Appendix B

Council and Township Engineer by Boyar, Higgins & Suozzo, P.A. (James J. Higgins, Esq. appearing); by defendants, United States Environmental Protection Agency and Regional Administrator of Region II, by the United States Department of Justice (Mark A. Rigau, Esq. appearing); by defendants, Dorsey & Bell, John Dorsey and Joseph Bell, by Dorsey & Fisher (Douglas R. Cabana, Esq. appearing); and by defendants, Rockaway Valley Regional Sewerage Authority and Executive Director, by McManimon & Scotland (Joseph Maraziti, Esq. appearing); and on cross-motion of plaintiff, Nelson Fernandes for partial summary judgment (Nelson Fernandes, ***pro se*** appearing), and the Court having considered the papers filed by the moving parties and those submitted in opposition, having heard oral argument on March 27, 1995 and for good cause shown, all as set forth on the record;

IT IS on this 11th day of May, 1995:

ORDERED, that the motions of all defendants be and the same are hereby granted; and it is further

ORDERED, that the Amended Complaint be and the same is hereby dismissed with prejudice as to defendants, Rockaway Township Town Council and Township Engineer; Dorsey & Bell, John Dorsey and Joseph Bell; and Rockaway Valley Regional Sewerage Authority and its Executive Director, with no costs; and it is further

ORDERED, that the Amended Complaint be and the same is hereby dismissed without prejudice as to defendant, United States Environmental Protection Agency and Regional Administrator of Region II; and it is further

Appendix B

ORDERED, that plaintiff's motion for partial summary judgment be and the same is hereby denied; and it is further

ORDERED, that counsel for defendants, Rockaway Township Town Council and Township Engineer, shall serve a copy of this Order upon plaintiff *pro se* and all counsel appearing within 10 days of it having been entered.

s/ William H. Walls
WILLIAM H. WALLS, U.S.D.J.

APPENDIX C — NEW JERSEY SUPERIOR COURT APPELLATE DIVISION OPINION AFFIRMING JUDGMENT BELOW DISMISSING PETITIONER'S EARLIER STATE COURT CASE [DOCKET NO. A-4311-91] FILED JANUARY 22, 1993

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4311-91T2

NELSON FERNANDES,

Plaintiff-Appellant,

v.

ROCKAWAY TOWNSHIP TOWN COUNCIL AND TOWNSHIP ENGINEER,

Defendants-Respondents.

Argued December 9, 1992 — Decided JAN 22 1993

Before Judges Gaulkin and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Morris County.

Nelson Fernandes, *pro se*, argued the cause for appellant.

Appendix C

Joseph Bell argued the cause for respondents (Dorsey & Fisher, attorneys; John H. Dorsey on the brief).

PER CURIAM

Plaintiff appeals from a judgment dismissing his complaint which sought rescission and damages from defendants following conveyance by the Township of Rockaway of a lot purchased by plaintiff at public auction. Plaintiff planned to build a residence on the property and on an adjoining lot which he subsequently purchased. His plans were frustrated, however, because of a sewer ban imposed by the United States Environmental Protection Agency (EPA). Plaintiff claims that defendants' conduct in selling the lot and thereafter, in the circumstances when the "Township did conceal the existence of the EPA Grant Condition," the engineer "covered up this concealment" and the Township created "a false impression that lots could be connected to the sewer" (even after "[p]ercolation test results . . . show[ed] these lots cannot support septic systems"), constituted a "taking" and violated his federal constitutional and civil rights and various provisions of state law.

Particularly given plaintiff's acknowledgment of the "auction information" indicating that the property was sold "as is," and acknowledging the "terms and conditions" of the sale as embodied in the governing resolution in which the Township expressly made "[n]o representations of any kind . . . as to the condition" of the property, and making the sale subject to "existing conditions, covenants and restrictions" of all relevant government entities including the United States of America and the Township, we see no basis for disturbing the judgment. *R.* 2:11-3(e)(1)(A), (E).

In light of those provisions, we see no basis for the breach of contract claims advanced by plaintiff. While plaintiff argues that "[t]he issue before the court is a breach of contract not a tort claim," and cites cases for the proposition "that contract issues are not subject to the Tort Claims Act," he cites no authority for the proposition that "the Township would have a duty to disclose the condition to every buyer" and, in essence, that before the sale a municipality must affirmatively disclose all facts which can be disclosed by appropriate searches and inquiries of government agencies. While there may be reasons to suggest that a municipality should generally advise prospective purchasers of a known sewer ban relating to property to be sold at public auction, this is a matter for legislative policy, and we are referred to no authority in statute or case law so holding. We reject plaintiff's argument that *N.J.S.A.* 40A:12-13 barred the sale as "restricted pursuant to law." To the extent plaintiff relies on tort claims because of the personal injury aspect of the federal claims, *see Wilson v. Garcia*, 471 *U.S.* 261, 105 *S.Ct.* 1938, 85 *L.Ed.2d* 254 (1985), no timely notice was given as required by statute. *See N.J.S.A.* 59:8-8, -9.

The trial court concluded that plaintiff's federal civil rights claim pursuant to 42 *U.S.C.A.* § 1983 was barred by New Jersey's two year statute of limitations. *See Wilson v. Garcia, supra*; *N.J.S.A.* 2A:14-2. Plaintiff does not contest the applicable period but contends that defendants waived the statute of limitations because they failed to raise the defense in their pleadings. However, the Supreme Court has recognized that the statute of limitations is not waived for failure to plead it as an affirmative defense when it is later raised, as here, in defendants' motion for summary judgment. *Fees v. Trow*, 105 *N.J.* 330, 335 (1987); *Rappeport v. Flitcroft*, 90 *N.J. Super.* 578, 579-81 (App. Div. 1966).

Appendix C

We also conclude that any procedural defects noted by the plaintiff, even if they constituted error, cannot be said to have affected the result.

Finally, as plaintiff was not a "prevailing party" he was not entitled to the award of counsel fees or costs. *See* 42 *U.S.C.A.* §§ 1983, 1988; *N.J.S.A.* 2A:15-59.1. *See also R.* 4:42-8,-9(a)(8); *N.J.S.A.* 22A:2-5.

The judgment is affirmed.

Supreme Court, U.S.
FILED
AUG 9 1996
CLERK

3

NO. 95 - 2076

In The

SUPREME COURT

Of The

UNITED STATES

October Term, 1996

Nelson Fernandes,

Petitioner,

- vs -

Rockaway Township Town Council,
Township Engineer,

R.V.R.S.A. & Executive Director,

E.P.A. & Regional Administrator of Region II,

Dorsey and Bell

John Dorsey and Joseph Bell

Respondents.

REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF

Nelson Fernandes, Esq. (Pro-se)
9 Fox Run
Denville, New Jersey 07834
(201) 627 - 2138

13 pp

TABLE OF CONTENTS

	Page
OPENING STATEMENT	1
GRANT CONDITIONS NOT AUTHORIZED BY CWA	1
EPA MEMOS PROVES A CONTINUING VIOLATION	3
MR HARGROVE'S BAD FAITH & PERJURY	4
EVIDENCE OF FORBIDDEN PURPOSE	7
EPA IS LIABLE FOR DAMAGES	7
RESPONSE TO BRIEF IN OPPOSITION	8

TABLE OF CITATIONS

Accardi v. Shaughnessy, 347 U.S. 260, 266-267 (1953)	3
Ackley v. West. Conf. of Teamsters, 958 F.2d 1463 (1992)	4
Antilles Ind., Inc. v. Gov. of V.I., 388 F.Supp. 315	5
James B. Beam Dist. Co. v. Georgia, 111 S.Ct. 2439 (1991)	2
Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3rd.Cir.1983)	2
Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179	9
Columbus Bd. of Ed. v. Pennick, 443 U.S. 449, 464 (1979)	7
Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y. 1980)	7
Golden St. Trans. Corp. v. L.A., 493 U.S. 103, 112 (1989)	2, 8
Hazel-Atlas Co.v. Hartford Co., 322 U.S. 238, 245 (1943)	10
Hecker v. Millburn, 538 F.2d 1241, 1245	6
Isreal Aircraft Ind. v. Standard Prec., 72 F.R.D. 456 (1976)	10
Jewett v. Inter. T. & T. Corp., 653 F.2d 89, 93 (3rd. Cir. 1981)	4
Jett v. Dallas Independent Sch. Dist., 491 U.S. 701, 742 (1968)	8
Luna v. Beto, 395 F.2d 35, 38	6
In re Melting Moments, Inc., Bkrtcy, 21 B.R. 173, 175	5

TABLE OF CITATIONS

Nudd v. Burrows, 91 U.S.426, 440 (1875)	9
Oneida Mot. Fr. Inc. v. United Jersey Bank, 848 F.2d 414 (1988)	9
Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 17	7
Pettinaro Const. Co. v. Del.Auth. Reg. Tr., 500 F.Supp. 559	3
Purgess v. Sharrock, 33 F.3d 134, 144 (2d.Cir. 1994)	9
Rueth v. U.S.E.P.A., 13 F.3d 227, 229 (7th.Cir.1993)	1
Sec. Comm'n v. Chenery Corp., 332 U.S. 194, 202 (1946)	2
So. Pines Assoc v. U.S., 912 F.2d 713, 715 (4th.Cir.1990)	1
Springer v. Seamen, 821 F.2d 871 (1st.Cir. 1987)	3
Texas & Pacific Ry. v. Rigsby, 241 U.S. at 38 (1915)	8
U.S. v. Leahy, 434 F.2d 7 (1st Cir. 1970)	3
U.S. v. McKeon, 738 F.2d 26 (2d.Cir.1984)	9
U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250	2, 10
Unpublished Case, 220 Ct. Cl. 605, 611 (4/6/79)	8
West v. Phil. Elec. Co., 45 F.3d 744, 752 (3rd. Cir. 1995)	3, 4
WOFAC Corp. v US, 269 F.Supp. 654 (1967)	3

STATUTES, REGULATIONS & RULES

Clean Water Act (CWA)	1
FRCP 56(g)	1
40 CFR Ch. I, Subpart F, §30.600 (E)	2, 5

OPENING STATEMENT

I appreciate the Solicitor General and RVRSA waiving their right to respond since Mr. Hargrove's affidavit and 1979 memo, as well as, Mr. Sullivan's memo proves the EPA Administrator for Region II acted without authority of law and contrary to due process. Petitioner thought EPA would admit its use of Mr. Hargrove's affidavit was an error since it appears intentionally filed to violate FRCP 56(g). In the absence of that admission, petitioner wishes to supplement his petition to show that affidavit meets the criteria for perjury in order to prove the district court abused its discretion by relying on that evidence.

GRANT CONDITIONS NOT AUTHORIZED BY CWA

Petitioner wishes to supplement his petition on the point that the Clean Water Act (CWA) requires EPA to act by order, not by grant condition (Pages 13-14 of petition). Petitioner has since found cases that supports the unambiguous statute that was reviewed. Southern Pines Assoc. by Goldmeier v. U.S., 912 F.2d 713, 715 (4th.Cir.1990) (Administrator can issue an order or bring a civil action). See also; Rueth v. U.S.E.P.A., 13 F.3d 227, 229 (7th.Cir.1993). Southern Pines also found the CWA requires a violation before the EPA can act, which further bars the use of a grant condition. EPA admitted the denial of sewer service was for the express purpose of preventing construction in Cape May Greene @ 186-187, which led that court to find EPA was trying to accomplish matters not included in the CWA. This proves EPA violates the CWA and the holdings of both Cape May Greene and Southern Pines in the case at bar.

The district court's decision also conflicts with the Supreme Court holding that an administrative agency must be equipped to act by general rule (regulation) or by individual order. Securities Comm'n v. Chenery Corp., 332 U.S. 194, 202 (1946). This holding is pertinent since the EPA violated regulation 40 CFR Ch. I, Subpart F, §30.600 (E) as was pointed out to the district court in petitioner's brief [1] and by proceeding by grant condition contrary to a statute that requires action by order.

Petitioner previously showed the district court disregarded the holdings of Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3rd.Cir.1983). That case found a denial of sewer service was not authorized by the CWA, which creates an implied right to sewer service. [2] Since that holding precedes EPA imposing the same condition on the RVRSA, the district court abused its discretion by disregarding a legal ruling antedate to the grant condition that affects petitioner. [3] Therefore, the district court abused its discretion by disregarding allegations and case law that was before it, making its decision arbitrary and irrational. West v. Phil. Elec. Co., 45 F.3d 744, 752 (3rd. Cir. 1995).

---

[1] Admissions in brief of party opposing motion for summary judgment are funtionally equivelant admissions on file and, as such, may be used in determining presence of a genuine issue of material fact. U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250.

[2] Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 112 (1989) (Violation of a federal right that has been found to be implicit in a statute's language is a direct violation of the right as though it were set forth in the text of the statute.)

[3] James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991) (court applies legal rules already decided antedate the events on which the dispute turns).

EPA MEMOS PROVE A CONTINUING VIOLATION

The district court had sufficient evidence that the EPA imposed a grant condition without any authority of law based on the holdings of Cape May Greene and the memos [4] of Mr. Hargrove and Mr. Sullivan. The court overlooked these material facts. Pettinaro Const. Co. v. Del.Auth. Reg. Tr., 500 F.Supp. 559. Mr. Hargrove's memo shows an absence of federal law to support the condition and clear reliance on contract law. While, Mr. Sillivan's memo requires enforcement of the condition by negotiating a denial of due process with the state. [5] These memos and the terms of the grant condition support the application of a continuing violation theory since it establishes the fact that the EPA was following **a pattern and practice of discrimination extending into the statutory** . . [limitations] **period."** Jewett v. Inter. Tel. & Tel. Corp., 653 F.2d 89, 93 (3rd. Cir. 1981); West v. Phil. Elec. Co., 45 F.3d 744, 752, 754 (3rd. Cir. 1995). Therefore, the district court's refusal to apply a continuing violation theory was an abuse of discretion and faulty. Ackley v. Western Conference of Teamsters, 958 F.2d 1463 (1992). (Evidence that proves the district court findings were erroneous warrants reversal).

---

[4] WOFAC Corp. v US, 269 F.Supp. 654 (1967) (Documentary exhibits would constitute matrices of opinion in lieu of findings of fact.)

[5] Accardi v.Shaughnessy, 347 U.S. 260, 266-267 (1953); United States v. Leahy, 434 F.2d 7 (1st Cir. 1970); Springer v. Seamen, 821 F.2d 871 (1st.Cir. 1987).

MR HARGROVE'S BAD FAITH & PERJURY

The following comparison of Mr. Hargrove's affidavit as compared to his 1979 memo as previously submitted, shows that he committed perjury as petitioner claimed, since his 1979 memo fails to present statutory authority, regulation, case law or facts that could support a reasonable belief to support his affidavit. That affidavit must go to the issue of his belief and knowledge in 1979, since his actions at that time are at issue in this case.

EPA claims the CWA as its sole authority to impose grant conditions. Mr. Hargrove's certification states, "**Protection of these areas is mandated by federal statutes, regulations, and policies.**" However, his 1979 memo that led to the grant condition (App. K, p.48) states: "**Protection of environmentally sensitive areas is mandated by Federal policy.**" There was no reliance on statute or regulation in 1979 when the grant condition was instituted. In fact, his certification and his 1979 memo fails to present any authority of law, or any construction of federal authority [6] to support a reasonable belief to avoid perjury. This proves his condition was arbitrary and capricious.[7] Mr. Hargrove's certification claims it is supported by regulation, which is refuted by 40 CFR Ch. I, Subpart F, §30.600 (E), a regulation that imposed an affirmative duty to provide the benefit of the program to any person, which was not refuted.

---

[6] A claim is not in bad faith if it has some legal and factual support, considered in light of reasonable belief of individual making claim. In re Melting Moments, Inc., Bkrtcy, 21 B.R. 173, 175

[7] 'Administrative action is "**arbitrary**" if it is taken without **any authority of law or upon a misconstruction of the statutory authority** under which it purports to be taken. Antilles Industries, Inc. v. Gov. of Vir. Is., 388 F.Supp. 315, 321, (D.C.Vir.Isl.).

Mr. Hargrove's 1979 memo also contains passages that prove he did not rely on the CWA by using the word ***"theoretically"*** in the following, which Webster's ninth collegiate dictionary defines to mean ***"confined to theory or speculation"***:

> **"since passage of the Clean Water Act, most of the design and construction of wastewater treatment facilities are financed by Federal grants. The remainder comes from state grants and bond issues which are recovered through user charges. Theoretically, facilities built using such financial backing could limit sewer hook-ups."**

Mr. Hargrove's speculates instead of presenting law and facts, thus proving he lacked a basis for a reasonable belief before recommending the denial of a public benefit. His actions in 1979 also violates the regulation that specifically requires service be provided to any person, thus proving his memo and affidavit to be recklessly given for the purpose of misleading the court, [8] and to deny petitioner his clear legal rights. [9]

Other comments in his 1979 memo that prove he was conducting himself in a reckless fashion, include:

> **"The question of allowing hook-ups rests with both the authority and the municipalities. The authority is free to reasonably fix the terms and conditions of service.**

---

[8] Perjury is giving an affidavit recklessly for the purpose of having it believed. Com. v. Leitch, 137 A.2d 909, 912.

[9] "Bad faith" may be demonstrated in the conduct which necessitated the action or in the conduct occurring during the course of the litigation; bad faith may be demonstrated by showing that a defendant's obstancy in granting a plaintiff his clear legal rights. Hecker v. Millburn, 538 F.2d 1241, 1245.

It implies the right to impose the grant condition contrary to the EPA regulation. Another comment by him, says:

> **"State law does give to the authority the ability to enter into contracts. These contracts are primarily with municipalities for sewage collection and disposal. It seems to *imply* that they can also enter into contracts with EPA through grant agreements. These contracts stand on the same footing as contracts between natural persons or municipalities."** (emphasis added)

Mr. Hargrove relies on a construction of state law as giving a sewer authority the right to accept grant conditions, rather then providing preemptive federal authority to establish a statutory mandate. No statutory or regulatory authority was ever presented to support his belief. [10] Since Mr. Hargrove was a Soil Conservationist, his ***opinion*** on the law could not be considered what Webster's ninth collegiate dictionary defines ***as advise by expert*** in order for the EPA to rely on that ***opinion*** in support of a policy to override a federal regulation. Therefore, his affidavit was tendered in bad faith in order to achieve summary judgment, thus avoiding a trial on the merits.

The regional administrator relied on these memos to impose grant condition 4(b) though they fail to present federal authority and violate due process. Hence, administrator violated the holding that **"[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."** Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. at 17.

---

[10] "Perjury" is the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in judicial proceeding upon oath and such assertion is material to the issue of inquiry and known to such witness to be false. Luna v. Beto, 395 F.2d 35, 38.

EVIDENCE OF FORBIDDEN PURPOSE

Mr. Hargrove's 1979 memo evinces a forbidden purpose. Furthermore, Mr. Sullivan's implementing the grant condition by negotiating a denial of due process with the state provides additional evidence of that forbidden purpose. Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y. 1980).

Mr. Hargrove's memo reviewed a N.J. regulation that prevents building a septic system on a lot that is within 100' of a sewer line. Therefore, Mr. Hargrove was fully aware that denying sewer service would prevent all construction, proving an intent to take private property by deceptive means in order to avoid paying compensation. The grant condition created an anomaly that interferes with a regulation intended to protect the public by creating a condition precedent that was conceived to improve the protection of public health, not to deny fundamental property rights. Therefore, Mr. Hargrove foresaw that his condition would prevent development contrary to the intent of the state regulation, which is relevant evidence to prove the ultimate fact, forbidden purpose. Columbus Board of Education v. Pennick, 443 U.S. 449, 464 (1979).

EPA IS LIABLE FOR DAMAGES

The Court of Claims held that a denial of sewer service or an interference with the right to contract for sewer services was a taking. It was part of its holdings in a matter involving a federal grant provided in support of the CWA. Unpublished Case, 220 Ct. Cl. 605, 611 (4/6/79). A grant that both protects the waters of this country while

providing a benefit to the public in the form of sewer services. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 112 (1989) (Violation of a federal right that has been found to be implicit in a statute's language is a direct violation of the right as though it were set forth in the text of the statute.)

Therefore, EPA's efforts to deny the benefit to those entitled to receive it, violates the holding that:

> **"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law."** Texas & Pacific Ry. v. Rigsby, 241 U.S. at 38 (1915); Jett v. Dallas Independent School Dist., 491 U.S. 701, 742 (1968)

RESPONSE TO BRIEF IN OPPOSITION

Respondents brief in opposition argues that petitioner presented issues that were decided in an earlier petition. The respondents position is subject to judicial estoppel, [11] since Mr. Cabana now argues a position contrary to the one he took in the former case, on page 15 of that brief, to-wit:

> **"Petitioner now raises a jurisdictional claim under 42 U.S.C § 2000d, a claim that was not raised before the state courts."**

---

[11] Judicial estoppel precludes a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3rd.Cir.1988)

The respondent now claims this issue was decided though he originally claimed that it was never raised.

As to Mr. Bell's fraud, Mr. Cabana formerly claimed:

> **"Petitioner fails to set forth any error committed by the state courts in their determination which would indicate a result being repugnant to the Constitution or any law of the United States or New Jersey."**

He now claims the fraud was reviewed, having claimed that it was not shown to be a court error. Their defense requires a judicial estoppel since they now claim the flip side of the same argument that was formerly presented.

Since fraud destroys the validity of any judgment, [12] it provides grounds for relief in accordance with Rule 60(b). [13] Therefore, petitioner filed this action seeking relief from that judgment by proving Mr. Bell's fraud can be used to bar res judicata. Purgess v. Sharrock, 33 F.3d 134, 144 (2d.Cir.1994); U.S. v. McKeon, 738 F.2d 26 (2d.Cir.1984). The court having erred by overlooking Mr. Bell's fraud before Judge Harper.

The respondents do not refute the events, the order of their occurrence, the evidence that is admissible at trial, or the allegations in the petition, thus leaving these matters in tact for this Court's review. Their former argument even admits Mr. Bell's fraud was never considered in the former case. [14]

---

[12] Nudd v. Burrows, 91 U.S. 426, 440 (1875)

[13] "And in cases where courts have exercised the power, the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, **or restraining the beneficiaries of the judgment from taking any benefit whatever from it.** Hazel-Atlas Co.v. Hartford Co., 322 U.S. 238, 245 (1943).

[14] Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179

Respondents review the case history and the district court opinion to dissuade you from reviewing the allegation that [15] Mr. Bell withheld material facts of personal knowledge from petitioner and the court. [16] He later admits the town's fraud and his knowledge of it to a different judge, but never disclosed his misrepresentation to the former judge

Dismissing Rockaway from the case would be inappropriate since ordinance § 54-100L continues to violate the same federal regulation violated by the other defendants. Furthermore, Mr. Bell's fraud was in support of a policy to sell lots affected by EPA's violation, which resulted in a scheme to injure a different segment of the public because of the loss in revenue that resulted. To disregard Mr. Bell's admission of the town's fraud after obtaining a bar of limitations by fraudulent means only undermines the legal process and petitioner's right to rely on a fair hearing.

Respectfully submitted,

Nelson Fernandes, Pro-se
9 Fox Run
Denville, New Jersey 07834

(D.C.Md. 1979) (A fraud that was considered in the judgment assailed bars action under Rule 60 (b))

[15] Admissions in brief of party opposing motion for summary judgment are funtionally equivelant admissions on file and, as such, may be used in determining presence of a genuine issue of material fact. U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250.

[16] "knowingly and fraudulently withheld from the defendant's, the court and the jury, matters material to the fair disposition of claims presented in this lawsuit **which were known by no one but themselves.** This constituted a serious interference with the judicial process" Isreal Aircraft Industries v. Standard Precision, 72 F.R.D. 456, 463 (1976).